

federal quarantine or isolation order is subject to up to a \$1,000 fine and one year in prison,<sup>99</sup> while in most states, violation of a quarantine order is a criminal misdemeanor.<sup>100</sup> State quarantine and isolation orders are enforceable under the states' police powers,<sup>101</sup> however, the surveillance monitoring required to enforce these measures implicates one's reasonable expectation of privacy. Together, quarantine and isolation orders help protect the public from an increased risk of exposure to Covid-19, but attempts by the government to enforce these orders have led to a decreased reasonable expectation of privacy because of (1) requirements of state quarantine orders on travelers, (2) anonymous reporting of Covid-19 violations, and (3) the implementation of ankle monitors in some states to enforce quarantine.

#### 1. State Quarantine Orders

Individuals traveling to different parts of the United States also have lower expectations of privacy depending on their destination due to mandatory quarantine orders, intrusive health forms, and Covid-19 checkpoints to enforce quarantine. As of March 2021, nearly half of the states require individuals traveling from certain states to self-quarantine for up to two weeks or prove they do not have Covid-19 by showing a negative test result taken within seventy-two hours of arrival to enter the state.<sup>102</sup> In addition to a mandatory fourteen day quarantine or showing proof of two negative Covid-19 tests, all travelers coming to New York must fill out a Health Department Traveler Form or risk a \$10,000 fine.<sup>103</sup> This form requires the traveler to list personal contact information, where they will be staying, and which states they have recently

<sup>99</sup> 42 U.S.C. § 271(a). Federal quarantine laws derive their power from the Commerce Clause. *Quarantine and Isolation*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html> [https://perma.cc/VC9V-326M].

<sup>100</sup> *Quarantine and Isolation*, *supra* note 99.

<sup>101</sup> *Id.*

<sup>102</sup> Karen Schwartz, *Thinking of Traveling in the U.S.? These States Have Travel Restrictions.*, N.Y. TIMES (Jan. 2, 2021), <https://www.nytimes.com/2020/07/10/travel/state-travel-restrictions.html> [https://perma.cc/7RK6-8CK4].

<sup>103</sup> *COVID-19 Travel Advisory*, N.Y. GOV'T, <https://coronavirus.health.ny.gov/covid-19-travel-advisory> [https://perma.cc/G4L2-4HQ5].

traveled to, in addition to being required to consent to daily monitoring calls or texts from the New York State Contact Tracing Program.<sup>104</sup> To ensure compliance for people taking different routes into New York, Mayor Bill de Blasio has set up Covid-19 checkpoints at bridges and tunnels into New York City, as well as at Penn Station and the Port Authority Bus Terminal, with the authority to stop cars at random.<sup>105</sup> Similarly to sobriety checkpoints,<sup>106</sup> these quarantine checkpoints are justified under the special needs doctrine even though prior to the pandemic, police would normally require probable cause or reasonable suspicion of a traffic violation to conduct an investigatory stop.<sup>107</sup> NYC Sheriff Joseph Fucito, whose office administers these checkpoints, stated, “Compliance with the quarantine is our objective and checkpoints are an effective means of ensuring travelers are on notice . . . ”<sup>108</sup>

By being “on notice,” of the possibility of these random stops and having to furnish personal information in the Traveler Form, travelers have a diminished reasonable expectation of privacy. The Surveillance Technology Oversight Project, a non-profit privacy advocacy group, expressed fear that this “mass data collection created significant privacy risks, without any public

<sup>104</sup> *Welcome to New York State Traveler Health Form*, N.Y. DEP’T OF HEALTH, <https://forms.ny.gov/s3/Welcome-to-New-York-State-Traveler-Health-Form> [<https://perma.cc/2HBA-SUFT>]. After traveling back to New York for the holidays and filling out the mandatory health form, I received a twelve minute phone call from a local health official who required me to answer an array of personal questions, such as whether I had any preexisting conditions, psychiatric conditions, neurodevelopment conditions, or immune weakening diseases (specifically HIV/AIDS). *See generally* N.Y. PHL § 2100; Westchester Cnty. Dep’t of Health Quarantine, *Protocol for 2019-Novel Coronavirus (2019-nCoV)*, Nov. 10, 2020 (“I am required to answer their questions regarding my condition.”).

<sup>105</sup> Noah Higgins-Dunn, *New York City Sets Up Quarantine Checkpoints As it Toughens State Travel Restrictions*, CNBC (Aug. 5, 2020, 10:54 AM), <https://www.cnbc.com/2020/08/05/new-york-city-sets-up-quarantine-checkpoints-as-it-toughens-state-travel-restrictions.html> [<https://perma.cc/4VXX-7V3Y>]. Airline passengers flying to New York are required to fill out this form before leaving the airport. *COVID-19 Travel Advisory*, N.Y. GOV’T, <https://coronavirus.health.ny.gov/covid-19-travel-advisory> [<https://perma.cc/SL7Q-GN55>].

<sup>106</sup> *See* *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

<sup>107</sup> *See* *Navarette v. California*, 572 U.S. 393, 397 (2014).

<sup>108</sup> Luke Funk, *NYC Sheriff to Set Up Quarantine Checkpoints at Crossings into City*, FOX 5 NY (Aug. 5, 2020), <https://www.fox5ny.com/news/nyc-sheriff-to-set-up-quarantine-checkpoints-at-crossings-into-city> [<https://perma.cc/F6VL-ND2E>].

health benefits.”<sup>109</sup> While it is unclear to what extent these policies will aid in limiting the spread of the virus, it is clear that citizens have a lower reasonable expectation of privacy as a result.

## 2. Anonymous Reporting of Covid-19 Violations

Some local governments have also encouraged citizens themselves to inform the government of any Covid-19 violations in their communities. For example, Riverside County, California created an app called RivCoMobile that allows county residents to anonymously report people and businesses suspected of violating Covid-19 regulations, such as breaking quarantine, hosting large gatherings, not social distancing, or not wearing facemasks inside essential businesses.<sup>110</sup> Residents also have the option to add a picture of the suspected violation.<sup>111</sup> New York has a similar program, which calls for individuals to file an online report if they suspect individuals or businesses are breaking quarantine or social distancing measures.<sup>112</sup> In Hawaii, tourists and residents have been jailed for violating quarantine based on reports by neighbors.<sup>113</sup> In these programs, because citizens are reporting this information on their own prerogative, the Fourth Amendment is not implicated.

## 3. Ankle Monitors and House Arrest

Other states are even using GPS ankle monitors and placing individuals on house arrest to enforce quarantine. For example, in April, a judge in West Virginia approved Kanawha County

<sup>109</sup> *S.T.O.P. Condemns NYC's COVID-19 Checkpoints*, SURVEILLANCE TECH. OVERSIGHT PROJECT (Aug. 5, 2020), <https://www.stopspying.org/latest-news/2020/8/5/stop-condemns-nycs-covid-19-checkpoints> [https://perma.cc/QK6N-7R2F].

<sup>110</sup> Jesus Reyes, *Riverside County Creates App to Report Coronavirus Order Violations*, KESQ (Apr. 9, 2020, 8:34 PM), <https://kesq.com/news/2020/04/09/riverside-county-creates-app-to-report-coronavirus-order-violations/> [https://perma.cc/N5VT-FGZ2].

<sup>111</sup> *Id.*

<sup>112</sup> *COVID-19 Travel Advisory*, N.Y. GOV'T, <https://coronavirus.health.ny.gov/covid-19-travel-advisory> [https://perma.cc/4DYS-BEDA].

<sup>113</sup> See Brian Mann, *Some States to Out-Of-Towners: If You Come Visit, Plan to Quarantine For 2 Weeks*, NPR (July 2, 2020, 2:39 PM), <https://www.npr.org/2020/07/02/886596560/some-states-to-out-of-towners-if-you-come-visit-plan-to-quarantine-for-two-weeks> [https://perma.cc/K7AY-2TL9].

sheriffs to attach ankle monitors to individuals who have tested positive for Covid-19 but refused to isolate.<sup>114</sup> In Kentucky, at least nine individuals who had or were presumed<sup>115</sup> to have Covid-19 have been ordered to wear ankle monitors.<sup>116</sup> Elizabeth Linscott, one of these Kentucky residents, was asymptomatic but decided to get tested for Covid-19 prior to visiting her parents and grandparents in Michigan.<sup>117</sup> After testing positive, the local health department called Elizabeth to get her and her husband to sign documents that would limit them from traveling without pre-approval from the health department.<sup>118</sup> Elizabeth stated that she agreed to call the Health Department if she was going to leave the house for any reason but did not sign the documents.<sup>119</sup> “My part was if I have to go to the ER, if I have to go to the hospital, I’m not going to wait to get the approval to go,” she said.<sup>120</sup> A few days later, the Hardin County Sheriff’s Department showed up to the couple’s house unannounced.<sup>121</sup> Elizabeth’s husband stated, “I open up the door and there’s like eight different people. Five different cars and I’m like what the heck’s going on? This guy’s in a suit with a mask, it’s the health department guy and he has three different papers for us. For me, her and my daughter.”<sup>122</sup> As a result, the Sheriff’s Department placed the couple on house arrest and ordered them wear ankle monitors.<sup>123</sup> If either

<sup>114</sup> Anthony Izaguirre, *W.Va. Judge Allows Ankle Monitors for Virus Scofflaws*, U.S. NEWS (Apr. 6, 2020, 4:39 PM), <https://www.usnews.com/news/best-states/west-virginia/articles/2020-04-06/wva-judge-allows-ankle-monitors-for-virus-scofflaws> [https://perma.cc/8F77-BPMA].

<sup>115</sup> A person is “presumed” to have Covid-19 if they were living with a significant other who tested positive for the virus.

<sup>116</sup> See Raphael Satter, *To Keep COVID-19 Patients Home, Some U.S. States Weigh House Arrest Tech*, REUTERS (May 7, 2020, 8:08 AM), <https://www.reuters.com/article/us-health-coronavirus-quarantine-tech/to-keep-covid-19-patients-home-some-u-s-states-weigh-house-arrest-tech-idUSKBN22J1U8> [https://perma.cc/TM5S-YFVB]; Faith King, *Ky. Couple on House Arrest After Not Signing Positive COVID-19 Self-Isolation Order*, WBTV (July 17, 2020, 11:23 PM), <https://www.wbtv.com/2020/07/19/hardin-county-couple-house-arrest-after-not-signing-positive-covid-self-isolation-order/> [https://perma.cc/4UDS-H5YL].

<sup>117</sup> Faith King, *supra* note 116.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* This is enforceable under 902 Ky. Admin. Regs. 2:050.

Elizabeth or her husband traveled more than 200 feet, law enforcement would be notified.<sup>124</sup>

Hawaii also considered using ankle monitors to enforce its two week quarantine but put the idea on hold after pushback from the state's attorney general.<sup>125</sup> The use of court sanctioned ankle monitors to enforce quarantine measures as covered on various major news outlets certainly put residents of West Virginia and Kentucky on notice that if they were presumed to have Covid-19, their freedoms could and would be restricted, thereby further diminishing their reasonable expectation of privacy.

While there are numerous actions that individual state and local governments, in addition to third-party actors, have taken to mitigate the spread of Covid-19 that have reduced society's reasonable expectation of privacy, it is worthwhile to briefly mention three additional measures that have minimal privacy implications but are quite prominent. First, many companies, such as Facebook, Google, and Apple, are assisting the government in collecting anonymized aggregate data that shows location and mobility trends among the population.<sup>126</sup> This data and the accompanying analysis can be helpful to forecast how the virus is spreading and to provide insight as to the effectiveness of current public health measures.<sup>127</sup> Second, numerous employers and businesses are implementing screening methods to prevent people with Covid-19 symptoms from entering the premises in order to safeguard others, such as through mandatory health forms

<sup>124</sup> King, *supra* note 118.

<sup>125</sup> Seth Colaner, *The Technologies the World is Using to Track Coronavirus—and People*, VENTUREBEAT (May 18, 2020, 9:16 AM), <https://venturebeat.com/2020/05/18/the-technologies-the-world-is-using-to-track-coronavirus-and-people/> [<https://perma.cc/99CR-27VV>].

<sup>126</sup> See Jennifer Daskal, *Good Health and Good Privacy Go Hand-in-Hand*, 11 AM. U. J. NAT'L SECURITY L. & POL'Y \_\_ (forthcoming 2020), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1062&context=research> [<https://perma.cc/EP3X-DYAL>]. While the aggregated data implicates minimal privacy concerns, depending on how the information is presented, there can be a serious risk of re-identification. *Id.* Yves-Alexandre de Montjoye et al., *Unique in the Shopping Mall: On the Reidentifiability of Credit Card Metadata*, 347 SCI. 536 (2015) (reidentifying 90% of aggregated credit card records using only four spatiotemporal points).

<sup>127</sup> See *Mobile Location Data and Covid-19: Q&A*, HUMAN RIGHTS WATCH (May 13, 2020), <https://www.hrw.org/news/2020/05/13/mobile-location-data-and-covid-19-qa#> [<https://perma.cc/67LS-JD8A>].

or taking people's temperatures.<sup>128</sup> Third, several states have created opt-in smart phone apps utilizing Bluetooth technology that residents can download for the purpose of contact tracing.<sup>129</sup> Overall, the wide array of Covid-19 policies have lowered privacy expectations throughout the United States.

### III. REASONABLE EXPECTATION OF PRIVACY AFTER THE COVID-19 PANDEMIC

Society's reasonable expectation of privacy has diminished as a result of the measures taken to mitigate the spread of Covid-19. The question remains, however, what will happen to our reasonable expectation of privacy when the pandemic ends and these policies are no longer necessary.<sup>130</sup> This Part argues that after Covid-19 policies start to become phased out, while society's reasonable expectation of privacy will rebound to an extent, it will remain lower than it was prior to the start of the pandemic because of the difficulties in regaining privacy that has already been taken away throughout the nation, coupled with the prospect of increased epidemics.

<sup>128</sup> See James Temple, *Prepare to Be Tracked and Tested as You Return to Work*, MIT TECH. REV. (May 22, 2020), <https://www.technologyreview.com/2020/05/22/1002122/prepare-to-be-tracked-and-tested-as-you-return-to-work/> [https://perma.cc/6UGM-PV5H]; Roni Caryn Rabin, *Fever Checks Are No Safeguard Against Covid-19*, N.Y. TIMES (Sept. 13, 2020), <https://www.nytimes.com/2020/09/13/health/covid-fever-checks-dining.html> [https://perma.cc/6U6E-3YNP] (stating that New York requires restaurants to check patrons' temperatures and collect contact information for indoor dining).

<sup>129</sup> Jefferson Graham, *Tracking Coronavirus: Are Apple and Google Contact Tracing Apps Available in Your State?*, USA TODAY (Oct. 2, 2020, 7:41 PM), <https://www.usatoday.com/story/tech/2020/10/02/apple-google-coronavirus-contact-tracing-apps/3592355001/> [https://perma.cc/69WL-B39V]. At least fourteen states have contact tracing apps currently available in the Apple and Google app stores, with several other states planning to launch their apps soon. *Id.* Unlike GPS location data, Bluetooth tracking does not reveal users' location information, but instead solely detects when two devices are within a close proximity of each other. GOOGLE, *Exposure Notifications: Using Technology to Help Public Health Authorities Fight COVID-19*, <https://www.google.com/covid19/exposurenotifications/> [https://perma.cc/7358-ZCD4].

<sup>130</sup> With the help of the Covid-19 vaccine, the United States is on track to achieve herd immunity by the end of 2021. Cory Stieg, *From Vaccines to Safe Socialization: Here's What to Expect In 2021, According to Experts*, CNBC (Jan 2, 2021, 9:00 AM), <https://www.cnbc.com/2021/01/02/covid-19-what-to-expect-in-2021.html> [https://perma.cc/FD6S-AFQ9]. Herd immunity occurs when enough people are immune to a disease—through vaccination or natural infection—making its spread unlikely. *Preventing the spread of the coronavirus*, HARVARD MED. SCH. <https://www.health.harvard.edu/diseases-and-conditions/preventing-the-spread-of-the-coronavirus> [https://perma.cc/2R2R-EYJP].

### A. Difficulties Regaining One's Reasonable Expectation of Privacy

Any individual who has ever walked through a Transportation Security Administration (TSA) checkpoint at the airport can directly observe that it is easy to lower privacy expectations but difficult to raise them again. Prior to the September 11, 2001 terrorist attack that shook the nation, in addition to an attempted shoe bombing three months later,<sup>131</sup> travelers were only required to pass through metal detectors before boarding a plane.<sup>132</sup> Over the next several years, travelers came to recognize stricter screening methods as the new normal, and everyone's privacy expectations adjusted accordingly. In present times, when nearing the front of a TSA checkpoint line, passengers know to take off their shoes, belt, jacket, and metal items without a second thought.<sup>133</sup> They know to place their belongings in a bin and their large electronic devices in a separate bin to go through the X-ray machine all prior to passing through a full body scanner<sup>134</sup> themselves, potentially subject to an additional pat down. This is especially true for older Americans who have metal implants from surgeries such as hip or knee replacements who know in advance they will set off the metal detector and will likely be subject to an additional pat-down and screening with a metal detecting wand.<sup>135</sup>

<sup>131</sup> *Shoe Bomber: Tale of Another Failed Terrorist Attack*, CNN (Dec. 25, 2009, 10:23 PM), <https://www.cnn.com/2009/CRIME/12/25/richard.reid.shoe.bomber/index.html> [<https://perma.cc/NRR4-9UYY>].

<sup>132</sup> Holly Shively, *Airport security: Is It Safer Post-9/11?*, DAYTON DAILY NEWS (Sept. 11, 2018), <https://www.daytondailynews.com/news/airport-security-safer-post/8HfW4NTml3QDi9bd7yWYZP/> [<https://perma.cc/CX53-JSXS>].

<sup>133</sup> Travelers who qualify for TSA pre-check can avoid these requirements. *Id.*

<sup>134</sup> The TSA uses Advanced Image Technology scanners that rely on millimeter wave imaging to identify any threats. Emily DiNuzzo, *Here's What Airport Body Scanners Really See*, READER'S DIGEST (July 29, 2020), <https://www.rd.com/article/what-do-airport-body-scanners-see/> [<https://perma.cc/ZW5W-LEBW>]. This technology replaced X-ray machines in 2013 because the X-ray machines caused people to appear unclothed and raised privacy concerns. See Paul Trainer, *TSA X-Ray Machines: What You Should Know*, SKYSCANNER (Feb. 25, 2018), <https://www.skyscanner.com/tips-and-inspiration/tsa-x-ray-machines> [<https://perma.cc/GPH9-6AM3>].

<sup>135</sup> Jonathan Cluett, *Metal Detectors and Orthopedic Implants*, VERY WELL HEALTH (July 22, 2020), <https://www.verywellhealth.com/will-a-metal-implant-set-off-metal-detectors-2549530> [<https://perma.cc/HE8K-NBD3>].

Several appellate courts have found these screening procedures to be legally justified as warrantless administrative searches, in part due to 9/11 itself.<sup>136</sup> Moreover, after one failed shoe bombing attempt, the TSA continues to require all travelers to remove their shoes twenty years later<sup>137</sup>—the United States being the only country that imposes this requirement.<sup>138</sup> In addition, following 9/11, President George W. Bush signed a presidential order allowing the National Security Agency to monitor millions of Americans’ international phone calls without a warrant<sup>139</sup> and without any suspicion of misconduct—a practice that continued years later.<sup>140</sup> Amnesty International warns that based on the significant expansion of surveillance capabilities and infrastructure following these terrorist events, there is a real danger that once surveillance measures are put into place, the government rarely has the political will to end them.<sup>141</sup> With the nation’s top scientists consistently pushing back previous estimations for when the United States will achieve herd immunity and Covid-19 policies can be safely rolled back,<sup>142</sup> society will likely endure lower privacy expectations for the foreseeable future.

<sup>136</sup> See, e.g., *United States v. Aukai*, 497 F.3d 955, 960, 960 n.6 (9th Cir. 2007) (finding that airport screening searches are reasonable under the administrative search doctrine) (“[T]he present threat of organized terrorists using the 9/11 tactic of hijacking commercial aircraft . . . is relevant to the reasonableness of the search procedures employed.”); *United States v. Hartwell*, 436 F.3d 174, 178–79 (3d Cir. 2006) (“[T]here can be no doubt that preventing terrorist attacks on airplanes is of paramount importance.”), *cert. denied*, 549 U.S. 945 (2006); *United States v. Yang*, 286 F.3d 940, 944 n.1 (7th Cir. 2002) (“[T]he events of September 11, 2001, only emphasize the heightened need to conduct searches at this nation’s international airports.”).

<sup>137</sup> See *TSA Explains Security Protocols for Travelers Departing U.S. Airports*, TSA (May 22, 2019), <https://www.tsa.gov/news/press/releases/2019/05/22/tsa-explains-security-protocols-travelers-departing-us-airports> [<https://perma.cc/SQ9X-2LM3>].

<sup>138</sup> Ed O’Keefe & Ashley Halsey III, *Shoe Removal Requirement at Airports to be Phased Out*, WASH. POST (Sept. 6, 2011), [https://www.washingtonpost.com/local/shoe-removal-requirement-at-airports-to-be-phased-out/2011/09/06/gIQAkLD7J\\_story.html](https://www.washingtonpost.com/local/shoe-removal-requirement-at-airports-to-be-phased-out/2011/09/06/gIQAkLD7J_story.html) [<https://perma.cc/T7AH-PW4M>] (“We all know why we do it here, but this seems to be a make-everybody-feel-good thing rather than a necessity.”).

<sup>139</sup> James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005),

<sup>140</sup> Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013), <https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> [<https://perma.cc/BYS5-FYCR>].

<sup>141</sup> *COVID-19, Surveillance and the Threat to Your Rights*, AMNESTY INT’L (Apr. 3, 2020, 2:58 PM), <https://www.amnesty.org/en/latest/news/2020/04/covid-19-surveillance-threat-to-your-rights/> [<https://perma.cc/FZR2-SWDE>].

<sup>142</sup> Although, the CDC and World Health Organization initially stated that herd immunity would be achieved when sixty to seventy percent of the nation was immune to the virus, in late December 2020, Dr. Fauci raised his estimate



Nevertheless, once a vaccine is widely distributed, at least the most stringent of the Covid-19 policies will likely be drawn back, and individuals will experience a partial rise in their reasonable expectation of privacy. People will no longer reasonably expect to have to fill out health disclosures and quarantine when crossing state lines, nor will they expect the government to enlist the populous to report them if they come down with a cold or host a modest gathering. Even so, due to the Covid-19 pandemic, society is gradually accepting more involuntary disclosures of health information, necessarily lowering its overall reasonable expectation of privacy in this data.

First, it is not yet clear what will happen with people who get sick with Covid-19 in the future. There are still many people who refuse to get a Covid-19 vaccination<sup>143</sup>—or are otherwise not advised to get the vaccine because they are too young, are immunocompromised, or are likely to have a severe allergic reaction to the vaccine<sup>144</sup>—and it does not appear that immunity lasts forever.<sup>145</sup> It is uncertain whether some of the current policies and restrictions will remain to account for people who are infected or re-infected with Covid-19 after the United States approaches herd immunity, or whether the disease will be treated similarly to the flu and

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to up to ninety percent. Donald G. McNeil Jr., *How Much Herd Immunity Is Enough?*, N.Y. TIMES (Dec. 24, 2020), <https://www.nytimes.com/2020/12/24/health/herd-immunity-covid-coronavirus.html> [<https://perma.cc/H77A-YBDR>].

<sup>143</sup> Tommy Beer, *Large Numbers of Health Care and Frontline Workers Are Refusing Covid-19 Vaccine*, FORBES (Jan. 2, 2021, 9:22 PM), <https://www.forbes.com/sites/tommybeer/2021/01/02/large-numbers-of-health-care-and-frontline-workers-are-refusing-covid-19-vaccine/?sh=76ee001b3c96> [<https://perma.cc/7KH8-9WKA>].

<sup>144</sup> *Who Should and Shouldn't Get the COVID-19 Vaccine?*, Yale Health, <https://yalehealth.yale.edu/who-should-and-shouldnt-get-covid-19-vaccine> [<https://perma.cc/7JDQ-RZVX>] (stating that people with severe allergic reactions to any component of the Covid-19 vaccine should not receive the vaccine). While it is currently unknown which specific components of the available Covid-19 may be responsible for initial severe allergic reactions in a small percentage of patients, some scientists suspect polyethylene glycol to be the cause. Jenifer Goodwin, *Likely More Than One Cause for COVID-19 Vaccine Reactions*, ALLERGIC LIVING (Jan. 3, 2021), <https://www.allergicliving.com/2021/01/03/likely-more-than-one-cause-for-covid-19-vaccine-reactions/> [<https://perma.cc/7B97-DKCH>].

<sup>145</sup> See *Facts about COVID-19 Vaccines*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/facts.html> [<https://perma.cc/LS3F-DM4L>]. From initial studies, it appears immunity may last at least five or six months. Julia Belluz, *Natural Immunity After Covid-19 Could Last At Least 5 Months*, VOX (Jan. 15, 2021), <https://www.vox.com/22230667/covid-immunity-natural-infection-symptoms-asymptomatic> [<https://perma.cc/2PJ4-2GZ5>].

allow sick individuals to leave their homes, go grocery shopping, and resume otherwise normal activities. Second, universities<sup>146</sup> and other businesses<sup>147</sup> may require individuals to show proof of a Covid-19 vaccination prior to being allowed to enter the premises. Third, when faced with future epidemics, society's privacy expectations will already be lowered from the wide array of surveillance measures taken to mitigate the spread of Covid-19. If, for example, businesses required temperature checks in response to a new outbreak where fevers were a common symptom, patrons would have a lower reasonable expectation of privacy having already experienced this. Even without a new disease, lowered privacy expectations may result in having one's temperature taken when going to work or to a routine dentist appointment simply being the new normal.

<sup>146</sup> All fifty states require students under the age of twenty-six to provide immunization records showing proof of specified vaccines, see *States With Religious and Philosophical Exemptions From School Immunization Requirements*, Nat'l Conference of State Legislatures (June 26, 2020), <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> [<https://perma.cc/6RE9-TJWQ>], and it is likely many universities will also require students be vaccinated against Covid-19. For example, students in Los Angeles, California will be required to get the Covid-19 vaccination to return to school as soon as it is available to them. Howard Blume, L.A. *Students Must Get COVID-19 Vaccine When It Becomes Available For Them*, *Beutner Says*, L.A. TIMES (Jan. 11, 2021, 3:56 PM), <https://www.latimes.com/california/story/2021-01-11/beutner-says-students-must-be-vaccinated-to-return-to-campus> [<https://perma.cc/4386-S47B>].

<sup>147</sup> Employers generally may require their employees to take the Covid-19 vaccination due to the nature of at-will employment. See Andrew Satter, *Covid-19 Vaccine: Can Your Employer Make You Take It? (Video)*, BLOOMBERG LAW (Jan. 15, 2021, 10:53 AM), [https://www.bloomberglaw.com/exp/eyJjdHh0IjoiQlVOVYsImkljoiMDAwMDAxNzYtZjM2Yy1kMDYyLWFmNzYtZjNlZTc4YWMwMDAxIiwic2lnIjoiTU9zTE10YnQ3MUFLSmFXRmFHNDIxL3duNnRrPSIsInRpbWUiOiOilxNjExMDY1OTkzIiwidXVpZCI6Imc2SmF0YXE3Sks1bnB1MmwzZTdCcGc9PVBQTzI2UklzMlc3Rit2VHhCZ01oZVE9PSIsInYiOiIiLn0=?usertype=External&bwid=00000176-f36c-d062-af76-f3ee78ac0001&qid=7044379&cti=LSCH&uc=1320020109&et=NEWSLETTER&emc=bbunw\\_nl%3A8&source=newsletter&item=read-button&region=featured-story](https://www.bloomberglaw.com/exp/eyJjdHh0IjoiQlVOVYsImkljoiMDAwMDAxNzYtZjM2Yy1kMDYyLWFmNzYtZjNlZTc4YWMwMDAxIiwic2lnIjoiTU9zTE10YnQ3MUFLSmFXRmFHNDIxL3duNnRrPSIsInRpbWUiOiOilxNjExMDY1OTkzIiwidXVpZCI6Imc2SmF0YXE3Sks1bnB1MmwzZTdCcGc9PVBQTzI2UklzMlc3Rit2VHhCZ01oZVE9PSIsInYiOiIiLn0=?usertype=External&bwid=00000176-f36c-d062-af76-f3ee78ac0001&qid=7044379&cti=LSCH&uc=1320020109&et=NEWSLETTER&emc=bbunw_nl%3A8&source=newsletter&item=read-button&region=featured-story) [<https://perma.cc/3WE7-APXJ>]. Dr. William Moss, executive director at the International Vaccine Access Center at John Hopkins, stated that similarly to the flu vaccine, he believes healthcare facilities will require their workers who have patient contact to take the Covid-19 vaccine. Kayla Hui, *Will COVID-19 Vaccines Be Required in Schools?*, VERY WELL HEALTH (Dec. 16, 2020), <https://www.verywellhealth.com/will-covid-19-vaccines-be-required-in-schools-5092514> [<https://perma.cc/CG92-8CGF>].

### B. Increases in Epidemics

A large increase in the rate of epidemics<sup>148</sup> throughout the globe<sup>149</sup> shows that the privacy concerns raised during Covid-19 will not go away on their own and require congressional action. Between the 1940s and 1960s, the rate of infectious disease events has more than doubled, with an additional spike in the 1980s due to the HIV epidemic that continues to rise.<sup>150</sup> The World Health Organization reported that between 2011 and 2018, there have been 1483 epidemic events in 172 countries, and since 2009, there have been six public health emergencies of international concern.<sup>151</sup> Some health experts and economists attribute this surge to increased urbanization, globalization, and human consumption of animal proteins.<sup>152</sup>

First, urbanization, which refers to the migration of people from rural to urban areas,<sup>153</sup> has increased dramatically throughout the world, along with population size.<sup>154</sup> With more people living closer together, diseases are able to spread far more quickly. Ebola, for example, existed for nearly four decades and was contained in rural areas of Africa before it entered cities in Liberia and Sierra Leone in 2014 and became widespread.<sup>155</sup> Second, increased globalization,

<sup>148</sup> An epidemic refers to a “[s]udden increase in cases of a disease,” while a pandemic refers to an “[e]vent in which a disease spreads across several countries and affects a large number of people.” *Identifying the Source of the Outbreak*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/about-epidemiology/identifying-source-outbreak.html> [<https://perma.cc/SZZ4-M5YT>].

<sup>149</sup> Jon Hilsenrath, *Global Viral Outbreaks Like Coronavirus, Once Rare, Will Become More Common*, WALL ST. J. (Mar. 6, 2020, 5:30 AM), <https://www.wsj.com/articles/viral-outbreaks-once-rare-become-part-of-the-global-landscape-11583455309> [<https://perma.cc/2DHR-Q9DF>].

<sup>150</sup> *Id.*

<sup>151</sup> Romain Espinosa et al., *Infectious Diseases and Meat Production*, *Environmental & Resource Economics* 1–26 (Aug. 4, 2020).

<sup>152</sup> Hilsenrath, *supra* note 150.

<sup>153</sup> H. Plecher, *Degree of Urbanization in the United States from 1970 to 2019*, STATISTA (Nov. 4, 2020), <https://www.statista.com/statistics/269967/urbanization-in-the-united-states/> [<https://perma.cc/N3QY-7A9N>].

<sup>154</sup> *The World Urban Population | Infographics*, URBANET (Aug. 25, 2016), <https://www.urbanet.info/world-urban-population/> [<https://perma.cc/8M84-EUVL>] (stating that in 2019, approximately 82.46 percent of people living in the United States lived in urban areas compared to 73.6 percent in 1970 and a far smaller percentage in years prior).

<sup>155</sup> *Factors That Contributed To Undetected Spread of the Ebola Virus and Impeded Rapid Containment*, WORLD HEALTH ORG. (Jan. 2015), <https://www.who.int/news-room/spotlight/one-year-into-the-ebola-epidemic/factors-that-contributed-to-undetected-spread-of-the-ebola-virus-and-impeded-rapid-containment> [<https://perma.cc/D746-VTTL>].

which refers to the increase in travel and connectivity between different parts of the world, has made it easier for diseases to spread.<sup>156</sup> This increase in people traveling across borders necessarily brings an increase in disease spread along with it. Lastly, an increased human consumption of animal proteins has put people in closer contact with disease carrying livestock, such as pigs and chickens.<sup>157</sup> As dense populations spread, there has been increased contact between farmed and wild animals, which has significantly increased the risks of epidemic outbreaks.<sup>158</sup>

Wuhan, China, the city in which Covid-19 was first discovered, contained essential elements of each of these characteristics. Between 2000 and 2018, Wuhan's population grew from eight million to eleven million, while the number of tourists grew from twenty million to 288 million.<sup>159</sup> During this time, the city's developed land increased by more than 300%, while China as a whole urbanized more rapidly than any other country.<sup>160</sup> Wuhan was also a notable hub for wildlife trade—which is most likely where the disease first originated<sup>161</sup>—causing Wuhan and other cities to ban the consumption of wildlife for food.<sup>162</sup>

Increased urbanization, globalization, and human consumption of animal proteins have ensured that more global epidemics are likely to result in our lifetimes. In March 2020, more

<sup>156</sup> Hilsenrath, *supra* note 150. In 1970, approximately 310 million passengers traveled by air, while in 2019, this number increased to nearly 4.4 billion. *Air Transport, Passengers Carried*, WORLD BANK, <https://data.worldbank.org/indicator/IS.AIR.PSGR?end=2019&start=1970> [https://perma.cc/XUH9-7PCE].

<sup>157</sup> Hilsenrath, *supra* note 150. Scientists estimate that approximately seventy-five percent of new or emerging diseases in humans originate from animals. *Zoonotic Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/onehealth/basics/zoonotic-diseases.html> [https://perma.cc/PP9L-8KSF].

<sup>158</sup> See Romain Espinosa et al., *Infectious Diseases and Meat Production*, *Environmental & Resource Economics* 1–26 (Aug. 4, 2020).

<sup>159</sup> See Hilsenrath, *supra* note 150.

<sup>160</sup> *Id.*

<sup>161</sup> Sandi Sidhu & Nectar Gan, *Wildlife Trade Most Likely Pathway For Coronavirus to Arrive in Wuhan*, *WHO Expert Says*, CNN (Mar. 29, 2021, 5:01 AM), <https://www.cnn.com/2021/03/29/asia/who-wuhan-report-preview-intl-hnk/index.html> [https://perma.cc/25BS-CF94].

<sup>162</sup> Karen E. Lange, *What You Need To Know About Wildlife Markets and COVID-19*, HUMANE SOCIETY (June 4, 2020), <https://www.humanesociety.org/news/what-you-need-know-about-wildlife-markets-and-covid-19> [https://perma.cc/688D-6DH5].

than twenty-five countries, including France, Germany, and the United Kingdom, jointly wrote an article stating, “There will be other pandemics and other major health emergencies. . . . The question is not if, but when.”<sup>163</sup> This data supports the fact that the decrease in privacy expectations due to Covid-19 is not just a one-time concern. Having already experienced Covid-19 and the decreased expectation of privacy that comes with combating its spread, society will continue to gradually accept more involuntary health disclosures in the face of future epidemics. In response, Congress should take immediate action to mitigate this loss of privacy expectations by narrowly amending HIPAA to safeguard this protected health information after the data is no longer necessary to combat the spread of Covid-19 through HIPAA’s standard de-identification requirements.

#### IV. RECOMMENDATIONS: AMENDING HIPAA’S PUBLIC HEALTH EXCEPTION TO DE-IDENTIFICATION

Since the start of the Covid-19 pandemic, public health officials have collected an array of protected health information (PHI) to aid in contact tracing and quarantine monitoring. While the Covid-19 policies in place have lowered privacy expectations, they still play a key role in protecting the public and mitigating the spread of this virus. It is therefore important to implement a solution that balances privacy concerns with the reality that many of these policies are necessary to save lives. This Part proposes that Congress narrowly amend HIPAA’s public health exception to safeguard PHI—which would partially increase society’s reasonable expectation of privacy in their health information—by de-identifying the data and controlling

<sup>163</sup> *COVID-19 Shows Why United Action Is Needed For More Robust International Health Architecture*, WORLD HEALTH ORG. (Mar. 30, 2021), <https://www.who.int/news-room/commentaries/detail/op-ed---covid-19-shows-why-united-action-is-needed-for-more-robust-international-health-architecture> [<https://perma.cc/FZ2K-4LCR>].

who the data can be shared with after the crisis passes. This is of particular necessity because the exception currently does not provide any protections for the data after the pandemic passes.<sup>164</sup>

Under HIPAA's Privacy Rule, covered entities<sup>165</sup> are required to safeguard PHI from disclosure under most circumstances.<sup>166</sup> Even law enforcement personnel face restrictions and can only obtain PHI using an administrative subpoena if the information is relevant, material, limited in scope, and de-identified information would be insufficient.<sup>167</sup> In most other cases, HIPAA requires the information to be de-identified prior to sharing it.<sup>168</sup> However, these protections do not apply when a public health authority seeks the information to mitigate the spread of a disease.<sup>169</sup> This exception falls in line with the Privacy Rule's purpose of striking a balance between the protection of sensitive patient health information and the fact that disclosure may be necessary to assist during a public health crisis.<sup>170</sup>

There is no doubt that this exception is especially important in public health emergencies, such as Covid-19. The problem lies, however, in the lack of safeguards provided to this data once it is no longer needed to mitigate the spread of the virus. While some commentators argue that in this digital era, Fourth Amendment protections should extend to the government's use of

<sup>164</sup> See 45 C.F.R. § 164.512(b)(1)(i).

<sup>165</sup> A "covered entity" includes "(1) A health plan, (2) A health care clearinghouse, [and] (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter." 45 C.F.R. § 160.103 "Covered Entity."

<sup>166</sup> *Guidance Regarding Methods for De-identification of PHI in Accordance with the HIPAA Privacy Rule*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <https://www.hhs.gov/hipaa/for-professionals/privacy/special-topics/de-identification/index.html#protected> [<https://perma.cc/3YUJ-WUK9>].

<sup>167</sup> See 45 C.F.R. § 164.512(f)(1)(ii)(C).

<sup>168</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., <https://www.hhs.gov/hipaa/for-professionals/privacy/special-topics/de-identification/index.html#protected> [<https://perma.cc/9TBX-UP8R>]; 45 C.F.R. § 164.502(d).

<sup>169</sup> See 45 C.F.R. § 164.512(b)(1)(i).

<sup>170</sup> *Summary of the HIPAA Privacy Rule*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html> [<https://perma.cc/8XVP-RZUU>].

data even after it has been collected,<sup>171</sup> this is not the law today.<sup>172</sup> With an unprecedented amount of PHI being collected during today's global pandemic, society's reasonable expectation of privacy has diminished, and can only rise again if HIPAA's privacy protections reapply after the data is no longer necessary for the statutory exception in which it was originally collected.

Accordingly, this Note proposes that when PHI is collected to aid in mitigating the spread of a disease and is no longer necessary to ensure the safety of the population, this data should be de-identified on government servers according to HIPAA's standard statutory requirements. The specific statutory language would stay largely the same with an added qualifier through the addition of 45 C.F.R. § 164.512(b)(1)(i)(A):

***“(b) Standard: Uses and disclosures for public health activities -***

***(1) Permitted uses and disclosures.*** A covered entity may use or disclose protected health information for the public health activities and purposes described in this paragraph to:

***(i)*** A public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions; or, at the direction of a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority.”

***(A)*** *Once the protected health information is no longer needed for the purpose permitted in paragraph (b)(1)(i) of this section, the information must be de-identified within ninety (90) days<sup>173</sup> in accordance with the applicable requirements of §§ 164.514(b) and 164.502(d).* (emphasis added).

<sup>171</sup> See, e.g., Laura K. Donohue, *The Fourth Amendment in a Digital World*, 71 N.Y.U. ANN SURV. AM. L. 553, 558 (2017) (“[T]he absence of use restrictions in Fourth Amendment doctrine blinds the law to the deeper privacy interests at stake.”); Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 TEX. L. REV. 49, 53 (1995) (arguing for use restrictions for information collected under the Fourth Amendment).

<sup>172</sup> See Gregory Brazeal, *Mass Seizure and Mass Search*, 22 U. PA. J. CONST. L. 1001, 1058 (2020) (citing Emily Berman, *When Database Queries Are Fourth Amendment Searches*, 102 MINN. L. REV. 577, 578 (2017) (“So long as its collection is lawful, the Fourth Amendment has nothing to say about how information is employed.”)).

<sup>173</sup> Congress may determine how many days would be feasible to begin the de-identification process.

While many privacy advocates have called for all PHI collected to aid in contact tracing to be permanently wiped at this point,<sup>174</sup> this would ignore the significant interest in allowing public health officials to conduct long-term studies on Covid-19, such as any long lasting effects or complications arising months after contracting the disease. HIPAA’s de-identification standards—which mandate the removal of eighteen different identifiers and require an expert opinion certifying that there is only a “very small” risk of re-identification<sup>175</sup>—have already sufficiently dealt with this need by balancing privacy rights and the continual need for medical research.<sup>176</sup> The raw data also should not be allowed to be released to the public due to concerns that make re-identification a strong possibility.<sup>177</sup> Individuals who report to the government that they tested positive for Covid-19, for example, should not run the risk of their case status becoming public and potentially succumbing to societal blame or a lawsuit. Moreover, de-identifying this data ensures it cannot be used for purposes other than which it was collected, such as criminal law enforcement. If the police want this PHI to be re-identified, they must meet HIPAA’s stringent criteria.<sup>178</sup>

While this policy would address a major problem of protecting privacy interests—and thus the reasonable expectations of privacy individuals have in the PHI provided to the government—HIPAA generally does not cover health information collected by businesses, such

<sup>174</sup> See, e.g., Michael Gentithes & Harold J. Krent, *Pandemic Surveillance - The New Predictive Policing*, 12 ConLawNOW 57, 73 (2020) (calling for collected Covid-19 data to be destroyed once the crisis passes due to the risks of re-identification).

<sup>175</sup> 45 C.F.R. § 164.514(b).

<sup>176</sup> See 45 C.F.R. §§ 164.502(d) and 164.514(a)–(c) (allowing hospitals to use or disclose de-identified patient information for research purposes).

<sup>177</sup> See *supra* note 127.

<sup>178</sup> See 45 C.F.R. § 164.512(f)(1)(ii)(C) (permitting disclosure of PHI based on an administrative subpoena); 45 CFR § 164.514(c) (re-identification specifications).



as restaurants and employers in general.<sup>179</sup> Even if HIPAA could be expanded to cover these businesses that collect PHI during public health crises, individual businesses would not possess the expertise to properly de-identify this data in line with a person’s reasonable expectation of privacy. As such, this Note recommends that PHI collected by these entities and still in their possession as a result of Covid-19 should be destroyed once the crisis ends. Any useful information such as who tested positive for the disease likely would already have been provided to public health officials during the course of the pandemic and businesses should not have to possess this information indefinitely. This view was engrained in the Senate Republicans’ Covid-19 Consumer Data Protection Act of 2020—previously introduced in May 2020—as well as in Kansas’s Covid-19 data protection statute, which called for companies to delete or de-identify protected health information when it is no longer being used in response to Covid-19.<sup>180</sup>

This would not be the first time Congress used legislation to protect privacy rights. In 1986, Congress enacted the Stored Communications Act (SCA), which provides protection for individuals whose data is possessed by network service providers and would not otherwise be protected due to the third-party doctrine.<sup>181</sup> For example, the SCA provides that individuals have a reasonable expectation of privacy in the content of their emails and thus, the government would require a warrant to seize them, even though they are possessed by a third-party company.<sup>182</sup> This privacy law was substantial because at the time, the Supreme Court had not formally found

<sup>179</sup> See *Employers and Health Information in the Workplace*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <https://www.hhs.gov/hipaa/for-individuals/employers-health-information-workplace/index.html> [<https://perma.cc/9KZS-R958>]; 45 C.F.R. § 160.103 “Covered Entity.”

<sup>180</sup> Covid-19 Consumer Data Protection Act of 2020, S. 3663, 116th Cong. § 3(e); H.B. 2016 § 16(e)(4)(A)–(C) (Kan. 2020) (enacted) (providing that protected health information collected to aid in contact tracing may only be used “for the purpose of contact tracing and not for any other purpose,” and that the data should be destroyed once no longer needed to aid in contact tracing).

<sup>181</sup> 18 U.S.C. 121.

<sup>182</sup> Allegra Bianchini, *Always On, Always Listening: Navigating Fourth Amendment Rights in a Smart Home*, 86 GEO. WASH. L. REV. ARGUENDO 1, 18 (2018).

an exception for the content of emails to the third-party doctrine like in *Carpenter*, and individual privacy expectations rose accordingly. With respect to information that the Supreme Court has found no reasonable expectation of privacy in, such as bank records, the SCA requires the government to present a subpoena to acquire the information.<sup>183</sup> Amending HIPAA to further protect privacy rights after PHI is no longer needed to mitigate the spread of Covid-19 would partially mitigate the lowered reasonable expectation of privacy faced by society during an unprecedented pandemic by ensuring this data is de-identified according to standard HIPAA safeguards.

#### CONCLUSION

Current law lacks proper controls to safeguard privacy expectations in the face of a global pandemic. While HIPAA's Privacy Rule normally only allows PHI to be disclosed after de-identification to aid researchers, it includes exceptions during public health emergencies to ensure federal officials have the tools needed to combat the spread of a deadly disease. Although this is important, current law is silent on what can happen with the data after the crisis ends and provides no adequate reason for why the data should not be de-identified according to the statute's normal requirements after the crisis passes. Narrow federal legislation could be adopted to solve both of these problems by reimposing HIPAA's standard de-identification requirements after a crisis ends, as well as ensuring this data can only be used by public health officials and researchers in line with the reason the PHI was initially collected. Doing so will impose minimal impediment to public health officials and researchers, while simultaneously protecting society's reasonable expectation of privacy under the Fourth Amendment.

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<sup>183</sup> 18 U.S.C. § 2703(c)(2).

## Applicant Details

First Name **Denae**  
 Last Name **Kassotis**  
 Citizenship Status **U. S. Citizen**  
 Email Address [denaekassotis1@gmail.com](mailto:denaekassotis1@gmail.com)  
 Address

**Address**  
**Street**  
**20 EXCHANGE PLACE, 1412**  
**City**  
**New York**  
**State/Territory**  
**New York**  
**Zip**  
**10005**  
**Country**  
**United States**

Contact Phone Number **9145606228**

## Applicant Education

BA/BS From **University of Delaware**  
 Date of BA/BS **May 2016**  
 JD/LLB From **Fordham University School of Law**  
[https://www.fordham.edu/info/29081/center\\_for\\_judicial\\_engagement\\_and\\_clerkships](https://www.fordham.edu/info/29081/center_for_judicial_engagement_and_clerkships)  
 Date of JD/LLB **May 1, 2019**  
 Class Rank **10%**  
 Law Review/Journal **Yes**  
 Journal(s) **Urban Law Journal**  
 Moot Court Experience **No**

## Bar Admission

Admission(s) **New York**

### **Prior Judicial Experience**

Judicial  
Internships/           **Yes**  
Externships  
Post-graduate  
Judicial Law           **Yes**  
Clerk

### **Specialized Work Experience**

#### **Recommenders**

Sylvain, Olivier  
sylvain@law.fordham.edu  
646-312-8222

Gentile, Caroline  
CGENTILE@law.fordham.edu

Klotz, Michael  
michaelmaharklotz@gmail.com

**This applicant has certified that all data entered in this profile and  
any application documents are true and correct.**

**Denae Kassotis**

20 Exchange Place, Apt. 1412, New York, NY 10005  
(914) 560-6228 • dkassotis@fordham.edu

Honorable Lewis J. Liman  
U.S. District Court for the Southern District of New York  
500 Pearl Street  
New York, NY 10007-1312

March 1, 2022

Dear Judge Liman,

Please allow this to serve as my application for a clerkship in your Chambers for the August 2024 court term or any term thereafter.

My experience as a litigation associate and federal law clerk to the Honorable Judith C. McCarthy has affirmed my interest in clerking for a district judge and ultimately pursuing a career in public service. Throughout law school and my career thus far, I have honed my ability to quickly digest complex factual and legal scenarios, which makes me an excellent fit to serve as your clerk.

As an associate at Selendy & Gay, I work closely with the partnership on case strategy, supervise teams, and regularly provide written analysis of nuanced legal issues. I chose to work at Selendy for its robust *pro bono* practice and non-hierarchical structure, which has afforded me the opportunity to evaluate novel legal questions such as the ramifications of the 2018 First Step Act. I have drafted several briefs, including an *amicus* brief to the U.S. Supreme Court requesting that it hear argument as to why a Georgia law requiring intellectually-disabled defendants convicted of capital crimes to prove intellectual disability beyond a reasonable doubt contravenes the Eighth Amendment.

Before joining Selendy, I clerked for Judge McCarthy, for whom I wrote draft opinions and report and recommendations concerning an array of substantive issues, as well as bench memoranda adjudicating discovery disputes. I was involved in Judge McCarthy's hearings and conferences and was often asked to help render decisions in real time. I assisted Judge McCarthy in overseeing a Section 1983 trial and prepared *voir dire*, a jury charge, and a verdict sheet in connection with trial.

My interest in clerking began in law school when I interned for the Honorable Paul G. Gardephe and thereafter, the Manhattan District Attorney's Office. These experiences exposed me to litigation from the disparate perspectives of a neutral arbiter and an advocate and sparked my interest pursuing public service.

Enclosed please find my resume, unofficial law school transcript, and a writing sample. Under separate cover, please find letters of recommendation from Professor Olivier Sylvain, sylvain@law.fordham.edu, (646) 312-8222, Professor Caroline Gentile, cgentile@law.fordham.edu, (212) 636-7898, and Michael Klotz, mklotz@jonesday.com, (212) 326-3796. Further, Judge McCarthy has graciously offered to serve as a reference by phone at (914) 390-4124. Thank you for your kind consideration of my candidacy.

Respectfully,

/s/ Denae Kassotis  
Denae Kassotis

**DENAE KASSOTIS**

20 Exchange Place, Apt. 1412, New York, NY 10005 • (914) 560-6228 • dkassotis@fordham.edu

**EDUCATION**

**Fordham University School of Law**, New York, NY

J.D., *magna cum laude*, May 2019; G.P.A.: 3.66

**Honors/Activities:** *Fordham Urban Law Journal*, Notes and Articles Editor, Order of the Coif, Dispute Resolution Society, International Arbitration and Dispute Resolution Team, Fordham OUTLaws

**Publication:** Note, *The Fourth Amendment and Technological Exceptionalism After Carpenter: A Case Study on Hash-Value Matching*, 29 FORDHAM INTELL. PROP. L.J. 1243 (2019)

**University of Delaware**, Newark, DE

B.A., History, May 2016

**EXPERIENCE**

**Selendy & Gay PLLC**, New York, NY

*Associate*

November 2021 – Present

- Draft memoranda assessing merits of breach of contract, antitrust, and consumer protection claims for prospective engagement.
- Draft brief to New York State Supreme Court challenging convicted person's parole denial based on recent amendments to regulations governing the New York Board of Parole.
- Supervise document review and production in breach of contract dispute by training and managing bench attorneys.
- Research whether "stacked" sentences constitute extraordinary and compelling circumstances warranting compassionate release under the First Step Act and subsequent decisional law.

**The Honorable Judith C. McCarthy, U.S.M.J., U.S. District Court, S.D.N.Y.**, White Plains, NY

*Judicial Law Clerk*

September 2020 – October 2021

- Wrote draft opinions deciding motions concerning various areas of federal law including constitutional torts, employment and labor law, petitions for *habeas corpus*, and applications for attorneys' fees and costs.
- Assisted with drafting bench memoranda regarding discovery disputes and other pre-trial and post-trial motions.

**Jones Day**, New York, NY

*Law Clerk*

October 2019 – September 2020

*Summer Associate*

Summer 2018

- Drafted portions of briefs in support of dispositive motions to the Second Circuit, Southern District of New York, and New York State Supreme Court.
- Drafted pleadings, interrogatory responses, Local Rule 56.1 statements, and attorney declarations.
- Drafted multiple briefs in support of asylum applications and participated in asylum hearings in Laredo and San Antonio, Texas.

**Fordham University School of Law Academic Tutoring Program**, New York, NY

*Academic Tutor*

Academic Year 2018 – 2019

- Tutored two students each semester in constitutional law, tort law, and civil procedure.

**New York County District Attorney's Office**, New York, NY

*Legal Intern, Special Narcotics Prosecution*

Spring 2018

- Researched and drafted memoranda on criminal procedure, constitutional law, and evidentiary issues.
- Drafted response to a post-conviction motion brought pursuant to New York Criminal Procedure Law § 440.10.

**The Honorable Paul G. Gardephe, U.S.D.J., U.S. District Court, S.D.N.Y.**, New York, NY

*Judicial Intern*

Summer 2017

- Researched and wrote memoranda concerning civil matters including trademark infringement and violations of the Fair Labor Standards Act.

**INTERESTS**

Coffee enthusiast, runner, Greek chef, and avid NYT crossword.

**BAR ADMISSION**

New York, February 2021

**Denae, Kassotis**  
**Fordham University School of Law**  
**Cumulative G.P.A.: 3.662**

**Fall 2016**

Course Name	Instructor	Grade	Credit Units	Comments
Criminal Law	Abner Greene	A-	3.000	
Legal Process	Various	P	1.000	P/F mini-course during 1L orientation
Legal Writing/Research	Susan Glover	IP	2.000	In progress
Property	Carl Minzner	A-	5.000	
Torts	Howard Erichson	A	4.000	

Fall 2016 G.P.A.: 3.778

**Spring 2017**

Course Name	Instructor	Grade	Credit Units	Comments
Contracts	Helen Bender	B	4.000	
Civil Procedure	Joseph Landau	A-	4.000	
Constitutional Law	Robert Kaczorowski	A	4.000	
Legislation and Regulation	Kimani Paul-Emile	B	4.000	
Legal Writing/Research	Susan Glover	B+	3.000	

Spring 2017 G.P.A.: 3.404

**Fall 2017**

Course Name	Instructor	Grade	Credit Units	Comments
Corporations	Caroline Gentile	A	4.000	
Mediation and Negotiation Practicum	Various	P	2.000	P/F course required for Dispute Resolution Society

**Denae, Kassotis**  
**Fordham University School of Law**  
**Cumulative G.P.A.: 3.662**

Criminal Procedure: Investigative	Deborah Denno	B+	3.000	
Professional Responsibility	James Cohen	A	3.000	
Fashion Law	Susan Scafidi	B+	3.000	

Fall 2017 G.P.A.: 3.692

**Spring 2018**

Course Name	Instructor	Grade	Credit Units	Comments
Clinical Externship: Criminal Justice Seminar	Morris Fodeman	A-	1.000	
Clinical Externship	N/A	P	2.000	Externship Fieldwork: (Manhattan District Attorney's Office)
Advanced Mediation and Negotiation Practicum	Various	P	1.000	P/F course required for Dispute Resolution Society
Internet Based Crimes	Douglas Bloom Neal Pollard	A	2.000	
Information Law Survey	Olivier Sylvain	A-	4.000	
National Security Law	Andrew Kent	A	3.000	

Spring 2018 G.P.A.: 3.834

**Fall 2018**

Course Name	Instructor	Grade	Credit Units	Comments
Evidence	Daniel Capra	A	4.000	
Peer-to-Peer Mentorship	Linda Sugin	A-	1.000	



**Denae, Kassotis**  
**Fordham University School of Law**  
**Cumulative G.P.A.: 3.662**

Independent Study	Olivier Sylvain	P	2.000	Ultimately published Note in Intellectual Property Law Journal.
Urban Law Journal: Editor	N/A	IP	2.000	In progress.
Employment Discrimination	Lisa Tiech	A-	3.000	

Fall 2018 G.P.A.: 3.834

**Spring 2019**

Course Name	Instructor	Grade	Credit Units	Comments
Fundamental Lawyering Skills	Joshua Lax	A-	3.000	
Trial and Arbitration Advocacy	Anthony Ricco	B+	3.000	
Federal Courts	Andrew Kent	A	3.000	
Independent Study	Andrew Kent	P	2.000	Satisfied writing requirement.
Urban Law Journal	N/A	P	2.000	Notes and Articles Editor.

Spring 2019 G.P.A.: 3.667

***N.B., at graduation latin honors: Order of the Coif, Magna Cum Laude***

## FORDHAM UNIVERSITY SCHOOL OF LAW

### EXPLANATION OF TRANSCRIPT

#### Grade Scale for the Juris Doctor (J.D.)

<u>Effective Fall 2014</u>		<u>Prior to Fall 2014</u>	
Grade	Quality Points	Grade	Quality Points
A+	4.333	A+	4.30
A	4.000	A	4.00
A-	3.667	A-	3.70
B+	3.333	B+	3.30
B	3.000	B	3.00
B-	2.667	B-	2.70
C+	2.333	C+	2.30
C	2.000	C	2.00
C-	1.667	C-	1.70
D	1.000	D	1.00
F	0.000	F	0.00
P	Not in GPA	P	Not in GPA
S	Not in GPA	S	Not in GPA

**Class Ranking** - The Law School does not calculate class rankings.

**Transfer Credit** - Transfer credit (ex. TA, TB, etc.) represents work applicable to the current curriculum and must be a minimum of a "C" grade to be accepted. Transfer credit is not included in the weighted grade point average.

**Repeating Courses** - Only a course with a failed grade may be repeated. Failed required courses must be repeated. Failed elective courses may be repeated, however this is not required. If repeated, the quality points of the new grade will be half in value (ex. F/A would be 2.00 quality points). The original failing grade remains on the transcript.

#### Grade Scale for Master of Laws (LL.M.) and Master of Studies in Law (M.S.L.)

<u>Effective Fall 2017</u>		<u>Prior to Fall 2017</u>	
Grade	Quality Points	Grade	Description
H+	4.2	H (Honors)	Outstanding performance
H	4.0	VG (Very Good)	Excellent performance
H-	3.8	G (Good)	Above average performance
VG+	3.6	P (Pass)	Performance worthy of credit
VG	3.4	F (Fail)	Inferior performance that does not satisfy the minimum standard for course credit
VG-	3.2		
G+	3.0		
G	2.8		
G-	2.6		
P+	2.4		
P	2.2		
P-	2.0		
F	0.0		

*Effective Fall 2014 within each grade level (H, VG, G, P), students may be awarded a plus (+) or minus (-) to distinguish performance on the high end or the low end within the grade level.*

#### Grade Scale for Legal Writing and Introduction to U.S. Legal System Courses

(These grades are not factored into honors determinations)

##### Students Admitted Prior to Fall 2017

Grade	Description
HP (High Pass)	Outstanding
PA (Pass)	Good or Acceptable
LP (Low Pass)	Passing, but deficient performance
FA (Fail)	Performance unworthy of credit

##### Students Admitted Prior to Fall 2011

Grade	Description
H (Honors)	Outstanding
CR (Credit)	Good or Acceptable
F (Fail)	Performance unworthy of credit

#### Grade Scale for Doctor of Juridical Science (S.J.D.)

Grade	Description
CR	Credit
NR	No Credit

#### Administrative Grades that May be Used in J.D., LL.M., and M.S.L Programs

AUD (Auditing)	NC (No Credit)
CR (Credit)	NGR (No Grade Received)
INC (Incomplete)	S (Satisfactory)
IP (In Progress: year long course, final grade assigned in succeeding term)	U (Unsatisfactory)
	W (Withdrew)

*Student education records on reserve are maintained in accordance with Public Law 93-380, sec 438, "The Family Education Rights & Privacy Act" (FERPA). The policy of Fordham University pertinent to this legislation is available from the Registrar upon request.*

**Denae Kassotis**  
**University of Delaware**  
**Cumulative GPA: 3.288**

**Fall 2012**

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Nutrition Concepts		A	3	
Spanish III		B-	4	
General Psychology		A-	3	
Sociology		A	3	

**Spring 2013**

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Problems of Criminal Judiciaries		B+	3	
College Math and Statistics		B-		
U.S. History Since 1865		A-	3	
Woman's Studies		A-		
General Chemistry I		D+	4	

**Fall 2013**

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
World History II		B+	3	
Introduction to Legal Studies		B	3	
Western Civilizations I		A-	3	
English		A-	3	
Western Theatre		B	3	

**Spring 2014**

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to Statistical Methods		B	3	
General Chemistry II		B+	4	
Introduction to Marketing		B	3	
Microeconomics		C	3	

**Fall 2014**

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
American Politics		A	3	
Volcanoes and Earthquakes		B+	3	
Abnormal Psychology		A	3	
World History I		B+	3	

American Constitutional  
History

A

3

### Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Global Politics		A	3	
Business and Political Economies		A-	3	
Food for Thought		A	3	
American Industrial Society		A	3	
Philosophies of Life		A	3	

### Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
History of England to 1688		A-	3	
Civil Liberties		B	3	
Media Design and Culture		B+	3	
Indoor Cycle		P	1	
Life and Death of John F. Kennedy		A	3	

### Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Global Context for Leadership		A	3	
Punishing Speech		B+	3	
Modern China		B-	3	
American History Seminar		B	3	

Denae Kassotis  
20 Exchange Place, Apt. 1412, New York, NY 10005  
(914) 560-6228 · dkassotis@fordham.edu

WRITING SAMPLE

Attached please find an excerpt from my Note entitled *The Fourth Amendment and Technological Exceptionalism After Carpenter: A Case Study on Hash-Value Matching*. This Note assesses the impact of *Carpenter v. United States* on Fourth Amendment challenges implicating the private-search and third-party doctrines. I exemplify *Carpenter*'s ramifications through a discussion of electronic communication service provider's ("ECSP") use of hashing software to intercept digital contraband, specifically child sexual abuse material. When an ECSP identifies such contraband, it is statutorily required to share it with law enforcement.

Hashing software assigns a unique, alphanumeric value to any file sent via an ECSP's network. Generally, ECSP's voluntarily employ hashing software to ferret out child sexual abuse material. ECSPs maintain repositories of hash values associated with such child sexual abuse material. When a user uploads an unknown file with a hash value matching the hash value of a known abusive file, the PROTECT Act mandates that the ECSP report the match to the National Center for Missing and Exploited Children ("the NCMEC").

The following excerpt discusses *Carpenter*'s impact on the third-party and private-search exceptions to the Fourth Amendment in the context of information intermediaries such as ECSPs.

A. The Impact of *Carpenter* on the Reasonable Expectation of Privacy Test

The *Carpenter* court did not engage in a two-step reasonable expectation of privacy (“REP”) analysis to determine whether a search occurred.<sup>1</sup> Instead, Chief Justice Roberts enumerated three factors for courts to consider when deciding whether government action deserves constitutional scrutiny.<sup>2</sup> Further, notwithstanding well-settled precedent that an individual lacks an objective expectation of privacy in business records maintained by a third party, the Court held that the government’s retrieval of CSLI records without a warrant ran afoul of the Fourth Amendment.<sup>3</sup>

The specific question before the *Carpenter* court was whether a warrant is required for law enforcement to retrieve historic<sup>4</sup> cell-site-location information (“CSLI”) that is collected and maintained by private companies for legitimate business purposes.<sup>5</sup> A cell site is a cellular telephone tower, owned by a wireless carrier, that receives radio signals from customers’ cell phones.<sup>6</sup> When a cell-phone user makes a call, sends a text message or email, accesses the internet, or in any way connects to their cellular network, their cell phone establishes a radio connection with the closest cell site.<sup>7</sup> As a cell phone user moves, their phone sends radio signals to various cell sites.<sup>8</sup> The location of these cell sites can be used to estimate the user’s movement through triangulation.<sup>9</sup>

<sup>1</sup> See generally *Carpenter*, 138 S.Ct.

<sup>2</sup> See *id.* at 2223.

<sup>3</sup> Probable cause is only required when CSLI records are collected for seven days or more. *Id.* at 2206.

<sup>4</sup> Historic location information refers to “records stored by the wireless service provider that detail the location of a cell phone in the past (i.e. prior to entry of the court order authorizing government acquisition).” In re Order Authorizing Installation and Use of a Pen Register, 402 F. Supp. 2d 597, 599 (D. Md. 2005). By contrast, prospective location information refers to “all cell site information that is generated after the government has received court permission to acquire it.” *Id.*

<sup>5</sup> See generally *Carpenter*, 138 S.Ct.

<sup>6</sup> A NAT’L ASS’N OF CRIM. DEFENSE LAWYERS, CELL PHONE LOCATION TRACKING 1-3 (2006) [hereinafter CELL PHONE LOCATION TRACKING].

<sup>7</sup> *Carpenter*, 138 S.Ct. at 2224 (Kennedy, J., dissenting).

<sup>8</sup> CELL PHONE LOCATION TRACKING, *supra* note 6, at 2.

<sup>9</sup> *Id.*

The circumstances giving rise to the *Carpenter* case arose after police arrested four men suspected of a series of robberies.<sup>10</sup> One of the men confessed and provided police with the phone numbers of several accomplices.<sup>11</sup> The government used the confession and phone numbers to apply for an order pursuant to 18 U.S.C. § 2703(d) to obtain CSLI records for Carpenter.<sup>12</sup> Two orders were granted directing Carpenter’s wireless carrier to produce his CSLI records for a 127-day period.<sup>13</sup> The government obtained 12,898 location points chronicling Carpenter’s whereabouts during that time.<sup>14</sup> At trial, the government offered the CSLI records to show that Carpenter was near four of the robberies at the time that they occurred.<sup>15</sup> The trial court denied Carpenter’s motion to suppress the CSLI evidence and he was convicted following a jury trial.<sup>16</sup> The Sixth Circuit affirmed.<sup>17</sup>

The Supreme Court reversed, holding that law enforcement cannot collect historic CSLI for seven days or more without a warrant.<sup>18</sup> Notably, it found that acquiring CSLI is a search within the meaning of the Fourth Amendment regardless of “[w]hether the government employs its own surveillance technology . . . or leverages the technology of a wireless carrier,” marking a clear deviation from the formerly categorical rule that data held by a third party is outside the Fourth Amendment’s reach.<sup>19</sup> The *Carpenter* court also shifted away from the REP analysis, instead

<sup>10</sup> *Carpenter*, 138 S.Ct. at 2209.

<sup>11</sup> *Id.*

<sup>12</sup> Under the Electronic Communications Privacy Act, law enforcement may compel a wireless carrier to disclose “a record or other information pertaining to a subscriber to or customer of such service . . . when the government entity . . . offers *specific and articulable facts* showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.” 18 U.S.C. § 2703(c)–(d) (2010) (emphasis added); *see supra* Part I(A)(3). The foregoing standard is significantly lower than the probable cause standard. *See Illinois v. Gates*, 462 U.S. 213, 222 (1984).

<sup>13</sup> *Carpenter*, 138 S.Ct. at 2210.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 2217.

<sup>19</sup> *See id.*

applying a multi-factor test.<sup>20</sup> Justice Roberts enumerated three factors, aimed at the category of information sought by law enforcement, to assess whether a search occurred.<sup>21</sup> Lower courts addressing whether the warrantless retrieval of third-party data passes constitutional muster must now ask whether the category of information: (1) has a deeply revealing nature; (2) possesses depth, breath, and comprehensive reach; and (3) results from an inescapable and automatic form of data collection.<sup>22</sup>

The Court's focus on the type of information sought denotes a fundamental shift in Fourth Amendment jurisprudence, which traditionally focuses on government action when obtaining such information.<sup>23</sup> Under Justice Robert's new test, a court determining whether a search occurred will assess the "depth" and "breath" of information held by a third party.<sup>24</sup> Since no mandatory data retention regulations govern ECSPs, it is up to individual companies to decide how long to retain consumer data.<sup>25</sup> Therefore, when applied, the "depth" and "breath" factor will oblige courts to inquire into the decisions of private businesses, specifically, how long the company keeps consumer data and how much data it retains, in assessing whether a search occurred.<sup>26</sup>

The following subpart discusses *Carpenter*'s determination that acquiring CSLI is a search even when the government leverages the technology of a wireless carrier, a departure from the third-party doctrine, which is rooted in the expectation of privacy approach.<sup>27</sup>

<sup>20</sup> See *id.* at 2223.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See *United States v. Jacobsen*, 466 U.S. 109, 114 (1984); *United States v. Katz*, 389 U.S. 374, 353 (1967).

<sup>24</sup> *Carpenter*, 138 S.Ct. at 2223.

<sup>25</sup> See C. Ernesto, *How Long Does Your ISP Store IP-Address Logs?*, TORRENT FREAK (June 29, 2012), <https://torrentfreak.com/how-long-does-your-isp-store-ip-address-logs-120629/>.

<sup>26</sup> See *Carpenter*, 138 S.Ct. at 2223. In formulating data retention policies, companies balance the potential benefits of having access to consumer data against the cost of storing data and threat of a breach. See Ohm, *supra* note 97, at 31.

<sup>27</sup> The Supreme Court in *Smith v. Maryland* held that the defendant did not possess a REP in metadata collected by a pen register since "people in general [do not] entertain any actual expectation of privacy in the numbers they dial." 442 U.S. 735, 742 (1979) ("all telephone users realize that they must convey phone numbers to the telephone company since it is through telephone company switching equipment that their calls are completed.").



### 1. The Third-Party Doctrine

The third-party doctrine, as articulated in *Smith v. Maryland* and *United States v. Miller*, states that an individual does not retain a reasonable expectation of privacy in non-content information voluntarily conveyed to third parties, such as telephone numbers or bank records.<sup>28</sup> Such information is therefore not protected by the Fourth Amendment.<sup>29</sup> The third-party doctrine rests on two common law rules: the “assumption of risk”<sup>30</sup> and “voluntary exposure”<sup>31</sup> doctrines.

First, when a person voluntarily shares information with a third party, they “assume the risk” of disclosure and lose any Fourth Amendment protection over that information, “even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”<sup>32</sup> Second, it is axiomatic that “what a person *knowingly* exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”<sup>33</sup>

Applying these rules to the REP framework, the *Miller* court reasoned that an individual could not subjectively expect that what he shares with a third party will, in every case, remain secret.<sup>34</sup> *Miller* further emphasized that individuals have no objective expectation of privacy over information relayed to another that is subsequently given to the government.<sup>35</sup> These propositions have become known as the third-party exception to the warrant requirement.<sup>36</sup>

<sup>28</sup> *Id.* at 744; *United States v. Miller*, 425 U.S. 435, 440 (1976).

<sup>29</sup> *Miller*, 425 U.S. at 440.

<sup>30</sup> *Hoffa v. United States*, 387 U.S. 231, 233 (1967).

<sup>31</sup> *Katz*, 389 U.S. at 351.

<sup>32</sup> *Miller*, 425 U.S. at 443; *United States v. White*, 401 U.S. 745, 751 (1971) (holding that electronic surveillance of voluntary conversations between defendant and an informant does not violate the Fourth Amendment); *Hoffa*, 387 U.S. at 233 (defendant’s trust in an accomplice does not create a legitimate expectation of privacy that is infringed when accomplice delivers incriminating information to the government).

<sup>33</sup> *Katz*, 389 U.S. at 351.

<sup>34</sup> *Miller*, 425 U.S. at 449.

<sup>35</sup> *Id.* at 442 (“[t]he depositor takes the risk that the financial information he reveals to the bank may be relayed to the government. The risk remains notwithstanding the depositor’s reliance on the discretion of the third-party to maintain the established confidence.”).

<sup>36</sup> *See generally* *Smith*, 442 U.S.; *Miller*, 425 U.S.

Before *Carpenter*, courts perfunctorily applied the third-party doctrine to circumstances where the government accessed information that an individual shared with their ECSP.<sup>37</sup> Although *Carpenter*'s precise impact on the third-party doctrine remains unclear, the Court rejected the longstanding view that the third-party doctrine categorically prohibits Fourth Amendment inquiry whenever information is given to law enforcement by a private intermediary.<sup>38</sup> The Court implicitly adopted *Carpenter*'s argument that the third-party doctrine only "diminishes an expectation of privacy," and established a hierarchical standard that focuses on the *nature* of the information sought to determine the proper analysis.<sup>39</sup> Put differently, individuals will retain a diminished privacy interest in information that is more revealing, comprehensive, and inescapably collected than the information at issue in *Smith* and *Miller*.<sup>40</sup>

## 2. The Private-Search Doctrine

Government acquisition of hash evidence initially reviewed by a third party similarly implicates the private-search doctrine, which is intimately connected to the third-party doctrine, and thus, impacted by the *Carpenter* decision.<sup>41</sup> The private-search doctrine, like the third-party doctrine, is grounded in the assumption of risk and knowing exposure rules.<sup>42</sup> It also implicates

<sup>37</sup> See *United States v. Graham*, 846 F. Supp. 2d 384 (4th Cir. 2017) (holding that historic CSLI is not protected by the Fourth Amendment because of the third-party doctrine); *United States v. Davis*, 785 F.3d 498, 499 (11th Cir. 2014) (holding that individuals have no reasonable expectation of privacy in CSLI); *Am. Civil Liberties Union v. Clapper*, 959 F. Supp. 2d 724, 750 (S.D.N.Y. 2013) (finding that the National Security Agency's mass metadata collection program did not violate the Fourth Amendment because of the third-party doctrine); see also *Ohm*, *supra* note 94, at 1327-28 ("[a] court could reasonably hold that some of the content posted to Facebook has been knowingly exposed to the public, and following conventional Fourth Amendment law, rule that it may be obtained by the police without a warrant.").

<sup>38</sup> *Carpenter*, 138 S.Ct. at 2220 ("[t]here is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information collected by wireless carriers today"); cf. *Riley v. California*, 134 S.Ct. 2473, 2488 (2014) (rejecting the formerly categorical application of the search incident to arrest doctrine and holding that a cell phone cannot be searched incident to a lawful arrest).

<sup>39</sup> Brief for Petitioner at 8, *Carpenter v. United States*, 138 S.Ct. 2206 (2018) No. 16-402, 2017 WL 4838412, at \*24.

<sup>40</sup> *Carpenter*, 138 S.Ct. at 2223.

<sup>41</sup> See generally *Jacobsen*, 466 U.S.

<sup>42</sup> See *id.* at 114.

the same issues with information intermediaries as the third-party doctrine.<sup>43</sup> In *United States v. Jacobsen*, Justice White noted as much, stating that the private-search doctrine “shares many of the doctrinal underpinnings of cases establishing that ‘the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed to him by government authorities.’”<sup>44</sup> Moreover, in articulating the private-search rule, the *Jacobsen* majority explained that the rule “follows from the analysis applicable when private parties reveal other kinds of private information to the authorities.”<sup>45</sup> Both the private-search and third-party doctrines rely on the idea that “a private search extinguishes an individual’s reasonable expectation of privacy in the data searched.”<sup>46</sup> In both circumstances, once frustration of an individual’s expectation of privacy occurs by a private actor, the Fourth Amendment does not prohibit governmental use of the now “non-private information.”<sup>47</sup>

In *Jacobsen*, the Supreme Court addressed the implications of a private party revealing information to law enforcement outside of the context of records held by a third party.<sup>48</sup> There, two FedEx employees opened a damaged package pursuant to company policy regarding insurance claims.<sup>49</sup> While inspecting the package, the employees found a series of four zip-lock bags, the innermost containing six and a half ounces of white powder.<sup>50</sup> The employees notified the Drug Enforcement Agency (“DEA”) and placed the plastic bags back inside the package.<sup>51</sup> The DEA agent subsequently opened the package from the end that had already been visibly opened by the

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 130 (quoting *Miller*, 425 U.S. at 443).

<sup>45</sup> *Jacobsen*, 446 U.S. at 115.

<sup>46</sup> Priscilla Grantham Adams, *Fourth Amendment Applicability: Private Searches*, 4 NAT’L CENTER FOR JUST. AND THE RULE OF L. 1, 3-9 (2008).

<sup>47</sup> *Jacobsen*, 446 U.S. at 117.

<sup>48</sup> *Id.*; see also *United States v. Walter*, 447 U.S. 649, 658 (1980).

<sup>49</sup> *Jacobsen*, 446 U.S. at 112.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

employees, inspected each bag, and removed a small amount of the white substance to submit to a narcotics field test.<sup>52</sup> Defendant challenged the agent's opening of the package and testing of the powder as illegal searches in violation of his constitutional rights.<sup>53</sup> Expanding on its recent decision in *United States v. Walter*,<sup>54</sup> the majority concluded that the DEA agent had not conducted a search because he did not exceed the scope of the previous, private search when he opened the package and removed the plastic bags.<sup>55</sup> The Court based its conclusion on the defendant's assumption of risk, holding that the defendant revealed private information to another by sending the package via FedEx, and thus assumed the risk of disclosure to authorities.<sup>56</sup>

Today, *Jacobsen* stands for the proposition that a government search that merely replicates a previous private search is not subject to Fourth Amendment scrutiny.<sup>57</sup> A constitutional analysis is only triggered if the government search exceeds the scope of the private search.<sup>58</sup> Further, since the constitution proscribes only governmental action, private action does not violate the Fourth Amendment, regardless of whether it is reasonable or unreasonable, accidental or deliberate.<sup>59</sup>

### 3. Application of the Third-Party and Private-Search Doctrines to Hash Evidence

Turning to the instant hypothetical, must the government obtain a warrant to search hash evidence provided by an internet intermediary pursuant to statutory mandate? Likely not — yet.

<sup>52</sup> *Id.*

<sup>53</sup> See *infra* Part I(c)(3) (discussing the application of the binary search doctrine in *Jacobsen*).

<sup>54</sup> The Supreme Court in *Walter* held that law enforcement's warrantless viewing of a contraband video that was voluntarily turned over by a private party, constituted a Fourth Amendment search. 447 U.S. at 657. Since law enforcement gained substantially more knowledge from viewing the video than it had when it received the video from the private party, its actions expanded the formerly private search and required probable cause. *Id.*

<sup>55</sup> *Jacobsen*, 446 U.S. at 117.

<sup>56</sup> *Id.* at 114 (“[t]his standard follows from the analysis applicable when private parties reveal other kinds of private information to the authorities. It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information.”).

<sup>57</sup> See generally *id.*

<sup>58</sup> See *Walter*, 447 U.S. at 655.

<sup>59</sup> *Jacobsen*, 446 U.S. at 114.

All but one federal court<sup>60</sup> addressing the issue thus far has held that law enforcement's use of hash evidence obtained from an ECSP does not implicate the constitution, because an ECSP typically identifies the matching images as contraband and submits them to the NCMEC before law enforcement views them, implicating the private-search and third-party doctrines.<sup>61</sup>

Last year, the Fifth Circuit applied the private-search doctrine to a motion to suppress hash evidence in *United States v. Reddick*.<sup>62</sup> In *Reddick*, a Microsoft user uploaded several images to Microsoft Skydrive ("Skydrive"), a cloud hosting service.<sup>63</sup> Skydrive employs a program called PhotoDNA, which discerns the hash values of user uploaded files and compares them against a repository of hash values of known child pornography.<sup>64</sup> Based on a hash value match between Reddick's images and another image previously identified as child pornography, Microsoft sent the matching image and Reddick's Internet Protocol ("IP") address to NCMEC's CyberTipline.<sup>65</sup> NCMEC then sent its report ("CyberTip") to local law enforcement.<sup>66</sup> Upon receipt of the

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<sup>60</sup> In 2008, the Middle District of Pennsylvania was the first court to address the Fourth Amendment implications of warrantless hash-value matching in *United States v. Crist*, 627 F. Supp. 2d 575, 578 (2008). Although the *Crist* court concluded that "running [] hash-values" is a search protected by the Fourth Amendment, the case is inapplicable to this Note for two reasons. First, the private search that uncovered child pornography on defendant's computer was conducted by an individual, not automated software run by an ECSP. Second, the court's holding that by "subjecting [an] entire computer to a hash-value analysis, every file, internet history, picture, and 'buddy list' became available for government review [and] [s]uch examination constitutes a search," *id.* at 585, misconstrues what hash-values expose to an observer, *see United States v. Keith*, 980 F. Supp. 2d 33, 43 (D. Mass. 2013). Hash-values are predictors of data that reveal no more about the content of a file than a random number. *Id.* Exposing a hash-value to a government agent does not allow the agent to "review" the underlying file in the way the *Crist* court contemplated. *See id.* ("matching the hash-value of a file to a stored file is not the virtual equivalent of viewing the contents of the file. All the match says is that the two files are identical; it does not itself convey any information about the contents of the file."). Additionally, unlike a label, a hash-value has no inherent meaning. *See id.* As explained by the court in *United States v. Miller*, "a hash-value only acquires meaning when it matches with a hash-value in the child pornography repository and therefore reminds Google that it has seen that image before." CRIMINAL ACTION NO. 16-47-DJB-CJS, 2017 WL 2705963, at \*5 (E.D. Key. June 23, 2017).

<sup>61</sup> *See infra* Part I(A)(3).

<sup>62</sup> *See generally* *United States v. Reddick*, 900 F.3d 636 (5th Cir. 2018).

<sup>63</sup> A cloud hosting service allows customers to store mass amounts of data online and access it remotely. Vangie Beal, *Cloud Server Hosting*, WEBOPEDIA (last visited Nov. 10, 2018), [https://www.webopedia.com/TERM/C/cloud\\_server\\_hosting.html](https://www.webopedia.com/TERM/C/cloud_server_hosting.html). Rather than using a single server or virtual server, cloud server hosting services consist of multiple connected servers that comprise "the cloud." *Id.*

<sup>64</sup> *Reddick*, 900 F.3d at 637–38.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

CyberTip, an agent opened the suspect image, confirmed it contained child pornography, and applied for a warrant to search Reddick's home.<sup>67</sup> Reddick was arrested.<sup>68</sup> Following his indictment, Reddick moved to suppress all evidence of child pornography on the grounds that the detective conducted an illegal search when he opened the image associated with the CyberTip.<sup>69</sup> The district court denied Reddick's motion, holding that although the detective's viewing of the files invaded a recognized expectation of privacy, the evidence supported a good faith exception to the exclusionary rule.<sup>70</sup> The Fifth Circuit affirmed the lower court's denial of the motion but disagreed with the district court that the initial viewing of the file violated the Fourth Amendment.<sup>71</sup> The Fifth Circuit reasoned that the instant situation fell within the private-search exception described by *Jacobsen*, analogizing the content of the image Reddick uploaded to a physical package.<sup>72</sup> The court reasoned that when Reddick uploaded the images to SkyDrive, Microsoft's PhotoDNA program automatically reviewed them and compared them against an existing database.<sup>73</sup> Accordingly, Microsoft, a private actor, "inspected and deemed [Reddick's] 'package' suspicious," before its contents were turned over to law enforcement, thereby frustrating any expectation of privacy he had in the images.<sup>74</sup>

The analysis employed by the *Reddick* court is consistent with other courts addressing the private-search query arising from government acquisition of hash evidence.<sup>75</sup> However, since the

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *See supra* Part I(c)(2).

<sup>72</sup> *Reddick*, 900 F.3d at 639–40. "The exact issues presented by this case may be novel. But the governing constitutional principles set forth by the Supreme Court are not. The government effectively learned nothing from [the detective's] viewing of the files that it had not already learned from the private search. Accordingly, under the private search doctrine, the government did not violate [defendant's] Fourth Amendment rights." *Id.* at 640.

<sup>73</sup> *Id.* at 639.

<sup>74</sup> *Id.* (citing *Jacobsen*, 466 U.S. at 117).

<sup>75</sup> *See, e.g., Miller*, 2017 WL 2705963, at \*4; *United States v. Ackerman*, 831 F.3d 1292, 1306 (10th Cir. 2016).

private-search doctrine is firmly rooted pre-*Carpenter* Fourth Amendment jurisprudence, courts faced with motions to suppress hash evidence have only analyzed whether: (1) law enforcement’s activities exceeded the scope of the ECSP’s private search; and (2) whether ECSP’s are government “agents” for purposes of the Fourth Amendment.<sup>76</sup>

After *Carpenter*, assessing the implications of a digital, private search requires a fact-specific inquiry into the type of information collected.<sup>77</sup> However, absent clear government overreach, all reviewing courts have found that an officer’s visual examination of suspect images attached to CyberTip does not implicate the Fourth Amendment.<sup>78</sup>

<sup>76</sup> Since this Note argues that under certain circumstances, courts should deviate from the private-search doctrine — which is grounded in the REP framework — analyzing the scope of a private search and the boundaries of government agency are outside the purview of the present discussion. *But see, e.g., Ackerman*, 831 F.3d at 1306 (holding that law enforcement exceeded the scope of America Online’s private search when a detective opened *four* images attached to a NCMEC report and only *one* of the images matched a hash-value of a confirmed child pornographic image); *see also Miller*, 2017 WL 2705963, at \*2 (holding that Google is not a governmental agent when it voluntarily scans email attachments for apparent child pornography).

<sup>77</sup> *See Ackerman*, 831 F.3d at 1305.

<sup>78</sup> *See Jacobsen*, 466 U.S. at 114 (employing the “virtual certainty” test to determine the scope of a private search); *Reddick*, 900 F.3d at 639 (holding that detective’s visual review of the files attached to a NCMEC report did not “significant[ly] expand [] the search that had been conducted previously by a private party, sufficient to constitute a separate search”); *Miller*, 2017 WL 2705963, at \*5 (holding that the detective did not exceed Google’s private search since the detective had “near-certainty regarding what [he] would find and little chance to see much other than contraband.”).

## Applicant Details

First Name **Emile**  
 Middle Initial **J**  
 Last Name **Katz**  
 Citizenship Status **U. S. Citizen**  
 Email Address [emilejkatz@gmail.com](mailto:emilejkatz@gmail.com)

Address
Street
<b>2000 2nd Ave. S, 402</b>
City
<b>Birmingham</b>
State/Territory
<b>Alabama</b>
Zip
<b>35233</b>
Country
<b>United States</b>

Contact Phone Number **8479643246**

## Applicant Education

BA/BS From **Case Western Reserve University**  
 Date of BA/BS **May 2015**  
 JD/LLB From **University of California, Berkeley**  
**School of Law**  
<https://www.law.berkeley.edu/careers/>  
 Date of JD/LLB **May 14, 2021**  
 Class Rank **School does not rank**  
 Law Review/Journal **Yes**  
 Journal(s) **Berkeley Journal of International Law**  
**California Law Review**  
 Moot Court Experience **No**

## Bar Admission

Admission(s) **Illinois**

## Prior Judicial Experience



Judicial Internships/ Externships      **Yes**  
Post-graduate Judicial Law Clerk      **Yes**

### **Specialized Work Experience**

### **Recommenders**

Gould, Jonathan  
gould@berkeley.edu

Yoo, John  
jyoo@law.berkeley.edu  
(510) 600-3217

Gordon, Alexandra  
alexandra.rg@berkeley.edu

Chemerinsky, Erwin  
echemerinsky@law.berkeley.edu  
5106426483

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Dear Judge Liman,

I am a current law clerk for Judge Kevin Newsom on the Court of Appeals for the Eleventh Circuit and writing to apply for a term clerkship in your chambers.

As a law clerk for Judge Newsom, I have honed my legal research and writing skills while drafting numerous bench memoranda and opinions. Prior to my clerkship, I graduated from the University of California, Berkeley School of Law, where I served as an Associate Editor for the *California Law Review* and as a Senior Articles Editor for the *Berkeley Journal of International Law*. I also published a student Note in the *California Law Review* and wrote an article that will be published in the *Pace Law Review* this year.

Before law school, I developed a strong work ethic (mostly from scrubbing pots) while serving as a paratrooper in the Israel Defense Forces—a trait that has served me well in my legal career so far.

I studied at Northwestern during my 1L year after which I transferred to Berkeley to live with my partner. I have attached transcripts from both Berkeley and Northwestern. Thank you for considering my application. Please feel free to contact me if I can provide you with any additional information.

Sincerely,

Emile J. Katz

**EMILE J. KATZ**

2000 2nd Ave. S #402, Birmingham, Alabama 35233 • EmileJKatz@gmail.com • (847) 964-3246

**EDUCATION**

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**University of California, Berkeley School of Law, Berkeley, California**

*Juris Doctor*, May 2021

- California Law Review, *Associate Editor*
- Berkeley Journal of International Law, *Senior Articles Editor*
- Research Assistant to Professor Orin Kerr and Professor Rebecca Goldstein
- Pro bono honors

**Northwestern Pritzker School of Law, Chicago, Illinois**

*Candidate for Juris Doctor*, August 2018-May 2019

- GPA 3.857, Dean's List

**Case Western Reserve University, Cleveland, Ohio**

*Bachelor of Arts, History and Anthropology, cum laude*, May 2015

**EXPERIENCE**

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**Judge Kevin C. Newsom, U.S. Court of Appeals, Eleventh Circuit, Birmingham, Alabama**

*Law Clerk*, August 2021-August 2022

- Researched law, wrote bench memoranda, and drafted judicial opinions on a range of topics including constitutional claims, federal statutory claims, and state law claims.
- Edited and cite-checked other clerks' work

**Arnold & Porter Kaye Scholer, Chicago, Illinois & Washington, D.C.**

*Summer Associate*, June 2020-July 2020

- Drafted complaint for declaratory judgment and contract reformation
- Researched and drafted memo on procedural due process claim for appellate brief

**Judge Susan J. Dlott, U.S. District Court, Southern District of Ohio, Cincinnati, Ohio**

*Extern*, May 2019-July 2019

- Researched and wrote memoranda on state and federal case law regarding civil and criminal issues, such as labor law violations and sentencing guideline variances

**Immigrant and Refugee Law Center, Cincinnati, Ohio**

*Legal Intern*, May 2018-August 2018

- Researched and drafted memorandum about refugee seeking asylum from gang related violence

**Israel Defense Forces, Israel**

*Paratrooper/Sniper*, November 2015-December 2017

- Led small team during operations furthering area security goals
- Instructed new snipers and commanders

**BAR MEMBERSHIP**

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- Illinois

#### **PUBLICATIONS**

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- Note, *The "Judicial Power" and Contempt of Court: A Historical Analysis of the Contempt Power As Understood by the Founders*, 109 Cal. L. Rev. 1913 (2021)
- *Information Security in the Courts*, 126 Penn St. L. Rev. Penn Statim 26 (2021)
- *Grand Unified (Separation of Powers) Theory: Examining the U.S. Marshals*, 42 Pace L. Rev. \_\_\_\_ (2022) (publication forthcoming)

#### **ADDITIONAL INFORMATION**

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**Languages:** Hebrew (fluent)

**Interests:** Backpacking, reading novels, running, traveling, and cooking

**Emile Katz**  
**Northwestern University School of Law**  
**Cumulative GPA: 3.857**

**Fall 2018**

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Communication & Legal Reasoning	Grace Dodier	B+	2	
Civil Procedure	Richard Hoskins	B+	3	
Contracts	Emily Kadens	A	3	
Torts	Marshall Shapo	A+	3	
Criminal Law	Deborah Turkheimer	A-	3	

**Spring 2019**

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Property	Peter DiCola	A-	3	
Communication & Legal Reasoning	Grace Dodier	A-	2	
Contracts II: Complex Commercial Contracts	Emily Kadens	A+	3	
Estates and Trusts	Max Schanzenbach	A-	3	
Constitutional Law	Martin Redish	A+	3	

**Grading System Description**

All course work at Northwestern University School of Law is graded on a 4.33 grading scale. The authorized letter grades and their assigned numerical values are: A+ = 4.33, A= 4.00, A- = 3.67, B+=3.33, B=3.00. B-=2.67, C+=2.33, C=2.00, D=1.00. Mandatory Curve Policy

**First-Year Courses:**

In first-year required doctrinal courses, the mean will be 3.35, with a permitted range of 3.3 - 3.4.

Faculty are also required to adhere to a mandatory distribution of no more than 5% A+ grades (rounded up) and at least 10% B- and below grades (rounded down).

In Communication and Legal Reasoning (CLR) the mean will be 3.45, with a permitted range of 3.4 - 3.5.

**Upper-level doctrinal courses, including 1L Electives:**

In all upper-level doctrinal courses with enrollments of 13 or larger, the mean will be a 3.55, with a permitted range of 3.5 - 3.6. A doctrinal course is a lecture course in which the grade is primarily based on an exam.

# Berkeley Law

## University of California

### Office of the Registrar

Emile Katz  
Student ID: 3035415283  
Admit Term: 2019 Fall

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Page 1 of 2

#### Academic Program History

Major: Law (JD)

2019 Fall				
Course	Description	Units	Law Units	Grade
LAW 231	Crim Procedure-Investigations	4.0	4.0	HH
LAW 241	Erwin Chemerinsky Evidence	4.0	4.0	H
LAW 243	Sean Farhang Appellate Advocacy	3.0	3.0	H
	<b>Fulfills Writing Requirement</b>			
LAW 250	Alexandra Robert-Gordon Business Associations	4.0	4.0	P
	Stavros Gkantinis			

2020 Spring				
Course	Description	Units	Law Units	Grade
LAW 211.2	Prac Ethics: Simula Approach	2.0	2.0	CR
	<b>Fulfills Professional Responsibility Requirement</b>			
LAW 220.1	Bruce Budner Constitution in Early Republic	2.0	2.0	CR
	<b>Fulfills 1 of 2 Writing Requirements</b>			
LAW 222	John Yoo Federal Courts	5.0	5.0	CR
LAW 225	Amanda Tyler Legislation & Statutory Interp	3.0	3.0	CR
LAW 244.1	Jonathan Gould Adv Civ Pro:Complex Civil Lit	3.0	3.0	CR
	Andrew Bradt			
Term Totals		15.0	15.0	
Cumulative Totals		58.0	58.0	

\* Due to COVID-19, law school classes were graded credit/no pass in spring 2020.

Transfer Credits		
Units	Law Units	
Northwestern Univ School of Law	26.0	26.0
<b>Fulfills Constitutional Law Requirement</b>		
Northwestern Univ School of Law.	2.0	2.0
<b>Units Count Toward Experiential Requirement</b>		
Term Totals	43.0	43.0
Cumulative Totals	43.0	43.0

2020 Fall				
Course	Description	Units	Law Units	Grade
LAW 245	Negotiations	3.0	3.0	H
	<b>Units Count Toward Experiential Requirement</b>			
LAW 252.2	Jonathan Lee Esther Kim Antitrust Law	4.0	4.0	P
LAW 285.2D	Prasad Krishnamurthy Deth Penit Cl Sem I	2.0	2.0	CR
LAW 295.5D	Ty Alper Elisabeth Semel Death Penalty Clinic	4.0	4.0	CR
	<b>Units Count Toward Experiential Requirement</b>			
LAW 299	Ty Alper Elisabeth Semel Mridula Raman Indiv Res Project	2.0	2.0	HH
	John Yoo			
Term Totals		15.0	15.0	
Cumulative Totals		73.0	73.0	

  
 Carol Rachwald, Registrar

# Berkeley Law

## University of California

### Office of the Registrar

Emile Katz  
 Student ID: 3035415283  
 Admit Term: 2019 Fall

Printed: 2021-06-10 13:33  
 Page 2 of 2

2021 Spring					
Course		Description	Units	Law Units	Grade
LAW	220.9	First Amendment Kenneth Bamberger	3.0	3.0	HH
LAW	223	Administrative Law Jonathan Gould	4.0	4.0	H
LAW	278.78	Computer Crime Law Orin Kerr	3.0	3.0	H
LAW	299	Indiv Res Project Jonathan Gould	2.0	2.0	HH
			<u>Units</u>	<u>Law Units</u>	
Term Totals			12.0	12.0	
Cumulative Totals			85.0	85.0	



  
 Carol Rachwald, Registrar

University of California  
Berkeley Law  
270 Simon Hall  
Berkeley, CA 94720-7220  
510-642-2278

**KEY TO GRADES**

1. Grades for Academic Years 1970 to present:

HH	-	High Honors	CR	-	Credit
H	-	Honors	NP	-	Not Pass
P	-	Pass	I	-	Incomplete
PC	-	Pass Conditional or Substandard Pass (1997-98 to present)	IP	-	In Progress
NC	-	No Credit	NR	-	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: <https://www.law.berkeley.edu/careers/for-employers/grading-policy/>

Transcript questions should be referred to the Registrar.

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**Emile Katz**  
**Case Western Reserve University**  
**Cumulative GPA: 3.784**

**Fall 2011**

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Elem Functions Analytic Geom		B	3	
Greek Civilization		A	3	
Genes, Evolution and Ecology		B	3	
Genes, Evolution & Ecology Lab		B	1	
Immortality		A	4	

**Spring 2012**

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Roman Civilization		A	3	
Transformative Service Design		A	3	
Byzantine World 300-1453		A	3	
Books as Bombs		A	3	
Calc for Science & Engr I		A	4	

**Fall 2012**

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Being Humn Intr Soc/Cul Anth		A	3	
History of the Early Church		A	3	
Weight Training (2nd Half)		P	0	
American Hist thru Biography		A	3	
Intro to Financial Accounting		A	3	
Weight Training (1st Half)		P	0	

**Spring 2013**

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intl Bioethics Public Health		A	3	
Epidemics in Human History		A	3	
Intro to Modern World Hist		B	3	
Ancient and Medieval Spain		A	3	
Intro to Human Evolution		A	3	
Pirates Early Modern World		A	3	

### Summer 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
HSTY 300 Level Transfer Course		TR	4	

### Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Issues and Methods in History		A	3	
Intro to Stat Anlys in Soc Sci		B	3	
Human Osteology		A	4	
Science and Society		A	3	
Intro to American History		B	3	

### Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Vikings & Medieval Scandinavia		TR	4	
Modern Britain and Its Empire		TR	4	
The Middle Ages 300-1500		TR	4	
Anth Approaches to Religion		TR	4	

### Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Darwinian Medicine		B	3	
Rock Wall Climbing		P	0	
Senior Research Seminar		B	3	
Ancient Culture of Ohio Region		A	3	
Beginning Arabic I		A	4	
Hatha Yoga		P	0	

### Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Beginning Arabic II		A	4	
Globalization and Development		A	3	
Illegal Drugs and Society		A	3	
Cultural Ecology		A	3	

### Grading System Description

Undergraduate grades at Case Western Reserve University are issued on the following scale:

A Excellent 4  
B Good 3

C Fair 2  
D Passing 1  
F Failure 0  
I Incomplete  
W Withdrawal for a class  
WD Withdrawal from all classes during a given semester  
P Passing in a Pass/No Pass Course  
NP Not Passing in a Pass/No Pass Course  
R For courses which extend over more than one semester  
AD Audit  
TR Indicates transfer credits

May 24, 2021

The Honorable Lewis Liman  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, Room 1620  
New York, NY 10007-1312

**Re: Clerkship Candidate Emile Katz**

Dear Judge Liman:

I write to recommend Emile Katz for a clerkship in your chambers. Emile is an excellent student, a talented budding lawyer, and very nice person. I am confident that he would be a first-rate law clerk and I strongly recommend him to your chambers.

I know Emile quite well: I am currently supervising an independent paper that he is writing, and he has taken two classes with me—Legislation and Statutory Interpretation (Spring 2020) and Administrative Law (Spring 2021). In all of these settings, I have been impressed with Emile's strong legal analysis. In class, he is not only consistently prepared for cold calls, but he also asks questions that show a mastery of the material, an ability to think on his feet, and excitement about going beyond what we're learning in class. His exam performance has been very strong, and his statutory interpretation analysis in particular showcases many skills that will be useful to him in clerking: his ability to read statutory text closely, apply that text to novel fact patterns, and argue both sides of hard issues. While I have yet to assign Emile a letter grade (Berkeley went pass/fail due to COVID), his performance in my classes has been excellent. And this is characteristic of his performance both as a 1L at Northwestern, where he received nearly all A-range grades, and as a 2L and 3L at Berkeley, where he received honors grades in a number of challenging doctrinal classes.

My most one-on-one time with Emile has come through an independent writing credit that I supervised for him this semester. Emile was a pleasure to supervise, both because of his strong intellect and because, frankly, supervising Emile requires very little work. He proposed a project about the constitutional status of the U.S. Marshals, and in particular whether and how they fit into a tripartite separation of powers framework. We had one long conversation at the start of the semester, and two months later he presented me with a full draft that was clearly written, showed a mastery of the doctrine, and cleverly argued. We talked about the draft, and I pushed back on a few parts of it and asked for elaboration on a few others. Several weeks later he returned with a highly polished final draft. This experience only cemented my view that Emile would be a very strong law clerk.

More broadly, Emile would come to your chambers prepared to hit the ground running. He will be clerking on the Eleventh Circuit right after graduation, so he will already have experience in a judicial chambers and with many of the substantive areas of law that the federal courts confront. He spent a summer as an extern on a federal district court in Ohio, where he worked on both criminal and civil matters. And he has experience in both private practice, through a summer at Arnold & Porder, and in public interest law, through a summer at the Immigrant and Refugee Law Center. I've talked to Emile about these experiences, and it is clear that they have honed his research and writing skills to prepare him well for clerking.

Finally, Emile has a winning personality. He is energetic, warm, and outgoing, and I have very much enjoyed getting to know him.

For these reasons, I believe Emile Katz would be an excellent law clerk. Please do not hesitate to reach out with any questions.

Sincerely,

Jonathan Gould

Jonathan Gould - gould@berkeley.edu

February 28, 2022

The Honorable Lewis Liman  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, Room 1620  
New York, NY 10007-1312

Dear Judge Liman:

I am writing to recommend Emile Katz for a clerkship in your chambers. He is an engaging, thoughtful, and mature young man who has done everything from serve as a sniper in the Israel Defense Force to write on the original understanding of the inherent Article III contempt power.

Mr. Katz was a student in my Spring 2020 seminar on the Constitution in the Early Republic. The class teaches students how to conduct a rigorous examination of the original understanding of a constitutional provision. We begin by discussing the methodological debates over constitutional interpretation, and then follow by reading some of the classic authors of the Founding period, such as Bernard Bailyn and Gordon Wood. The class concludes by examining some of the central problems that confronted the framers and their responses. Students read a wide range of materials including the records of the Philadelphia Convention and the state ratification debates as well as leading examples of originalist scholarship and judicial opinions.

Throughout the semester, Mr. Katz was heavily involved in class discussion. He enjoyed challenging other points, always responding to others' viewpoints in a substantive and collegial manner. I was disappointed that the Spring 2020 semester was pass/fail; I am certain that his paper would have received one of the best grades in the class. He asked whether the inherent judicial power to sanction, identified by the Supreme Court in cases such as *Willy v. Coastal Corp.*, is consistent with the original understanding of Article III. I thought it the best piece I have read so far on the question, and it showed a deep understanding of the fundamental questions concerning the power of the federal courts and the reach of congressional regulation over their establishment.

Mr. Katz did extremely well at Northwestern Law, transferred here, and then continued to perform at a very high level. But what is most impressive about Mr. Katz is his commitment to public service. In my conversations with him, I have learned that he intends to use his law degree to serve society as a prosecutor, government official, or some other form of public service. As you can see from his resume, Mr. Katz volunteered for Israel Defense Forces and became a sniper and paratrooper. I think this has given him a maturity and seriousness that sets him apart. Everything Mr. Katz has done thus far in his legal training has been tailored toward becoming a skilled legal practitioner in service to the community.

Between his intellect, his experience, and his admirable career aspirations, Mr. Katz would make an outstanding clerk. I would be glad to answer any additional questions. Please feel free to reach me via phone at (510) 600.3217 or by email at [yooj@berkeley.edu](mailto:yooj@berkeley.edu).

Best wishes,

/s/

John Yoo  
Emanuel S. Heller Professor of Law  
University of California, Berkeley, School of Law

John Yoo - [jyoo@law.berkeley.edu](mailto:jyoo@law.berkeley.edu) - (510) 600-3217

May 24, 2020

The Honorable Lewis Liman  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, Room 1620  
New York, NY 10007-1312

Dear Judge Liman:

I write in support of Emile Katz's application to serve as a clerk in your chambers. Emile was a student in my Appellate Advocacy class in the fall of 2019 and he earned an Honors grade.

I am very familiar with Emile's writing and research skills because I reviewed multiple drafts of his work. Further, because Emile was a very engaged student and frequently came to office hours to discuss various aspects of his brief with me, I am aware of what an interesting thinker he is and what a delight he is to be around. Having served as a law clerk in District Court, a Staff Attorney at the Ninth Circuit, and now as a Superior Court judge, I know what it takes to excel in chambers.

In Appellate Advocacy, students brief and argue a case currently pending in the California Supreme Court, following the rules of court as closely as the classroom experience allows. By reputation, this is one of the hardest classes at Berkeley Law and thus tends to attract students, like Emile, who enjoy a challenge and hard work. Students have about two weeks to research the law and absorb the record, and they must do this while learning how to write a persuasive, full-length appellate brief.

Emile briefed and argued *People v. Lopez*, which addressed the question of whether pursuant to *Arizona v. Gant*, 556 U.S. 332 (2009), which limited the exception for warrantless searches incident to arrest, a police officer can search the interior of a suspect's vehicle for identification if the suspect fails to provide it upon request. Since 2002, under *People v. Arturo D.*, 27 Cal.4th 60 (2002), the law in California had been that officers could conduct a limited search for identification when a driver refuses to provide it. In *Lopez*, the trial court held that *Arturo D.* was no longer good law, *Gant* controlled this case, and the search of Ms. Lopez was invalid. The court of appeals reversed and held that *Gant* did not displace the *Arturo D.* identification exception and that the search for identification was constitutional.

The case turned out to be particularly challenging as the numerous legal issues fell solidly into the cracks of existing jurisprudence and there was no clear answer. It was also difficult, and took three instructors several weeks, to find a workable and complete argument structure. Emile handled the significant burden with maturity. The class involves a lot of editing and feedback, which can be trying for some students. Emile was receptive to and made good use of the comments and edits he received. He was not afraid to take risks and think expansively, but he was also able to judge which arguments did not work and set them aside.

Emile showed up to every class prepared and often emailed or came to office hours with incisive and challenging questions. I have seen great and steady improvement in his writing and appreciate that he continues to challenge himself to be better and better. By the end of the semester, through careful editing and rethinking, Emile produced a strong and well-supported brief. His oral argument was also well founded and well delivered.

Particularly impressive is that Emile did so well in a very difficult class while acclimating to a new law school, taking a number of challenging classes, participating in the Jewish Students Association, and serving as an editor on the *Berkeley Journal of International Law*.

Before attending law school, Emile spent two years serving in the Israeli Army. I have known a number of Americans in Emile's position of having Israeli citizenship through one parent, and each has avoided serving. Emile volunteered. The Israeli Army is a notoriously demanding and sometimes dangerous experience and it seems to have taught Emile a rare discipline, organization, and an ability to meet every test with grace.

Emile is a remarkably kind and generous person. He tended to stick around after a three-hour, evening class and chat about his work until I got into an Uber to go home. I attributed this to his being a highly motivated and interested student. He is, but this was only part of the story. One night, I had meetings with students after class for about 45 minutes and Emile returned when they were done. I asked if he needed help with his brief and he informed me that he had come back so I would not be standing in the dark, waiting for a car by myself late at night. Emile is a true mensch. I very much enjoyed teaching and getting to know him.

Emile was an absolute pleasure to have in class and he would be a wonderful addition to any chambers. He is a talented student and a delightful person. You, your staff, and the other clerks will enjoy him greatly.

I unreservedly recommend Emile. If you have any questions or I can be of further help, please do not hesitate to call me.

Sincerely,

Alexandra Robert Gordon

Alexandra Gordon - alexandra.rg@berkeley.edu

February 28, 2022

The Honorable Lewis Liman  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, Room 1620  
New York, NY 10007-1312

Dear Judge Liman:

I am writing to highly recommend Emile Katz for a judicial clerkship for the 2022-23 year. Mr. Katz will be clerking for Judge Kevin Newsom on the United States Court of Appeals for the Eleventh Circuit in 2021-22. Mr. Katz was a student in my Criminal Procedure: Investigations class in Fall 2019. He received a High Honors grade in the class and wrote one of the best exams in a class of 196 students. I have had many conversations with him and always have been very impressed.

Mr. Katz was a frequent participant in class discussions notwithstanding the size of the class. Also, he sat in the front row and we often spoke before class began. It was clear that he always was thoroughly prepared for class and always had thought carefully about the material. His comments during class discussion, like his exam, reflected exceptional analytical abilities and the ability to express himself articulately and concisely. I especially was impressed by the thoughtfulness and originality of his comments and questions.

Mr. Katz came to law school after service in the Israeli military. I think this experience is reflected in a seriousness of purpose and a maturity that is exceptional. I would feel comfortable entrusting him with the most difficult and sensitive matters and know that he would handle them in a thorough and professional manner.

I have no doubt that Mr. Katz will be an excellent law clerk and attorney. He is very smart, hard working, and conscientious. He also is a wonderfully kind person. I know you would very much enjoy working with him.

Sincerely,

s/  
Erwin Chemerinsky

Erwin Chemerinsky - echemerinsky@law.berkeley.edu - 5106426483

### Writing Sample

This is an excerpt from a brief written for an appellate advocacy class. The brief is based on the record of *People v. Lopez*, 453 P.3d 150 (Cal. 2019). The full brief is available upon request. The research, analysis, and writing are my own, including revisions based on comments provided by my professor.



## ARGUMENT

### II. THE SEARCHES OF MS. LOPEZ’S VEHICLE AND PURSE WERE UNREASONABLE AND UNCONSTITUTIONAL

#### A. The Searches Of Ms. Lopez’s Vehicle And Purse Were Invalid Because No Specific Exception To The Warrant Requirement Applies.

The Fourth Amendment grants the people the right to “be secure in their persons...and effects against unreasonable searches and seizures.” U.S. Const. Amend. IV. Thus, a search violates the Fourth Amendment if it is unreasonable. Warrantless searches “are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357 (1967); *see also Riley v. California*, 573 U.S. 373, 381-82 (2014) (“[I]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.”). Moreover, the exceptions to the warrant requirement are specific, well delineated, and should be construed narrowly. *See Jones v. United States*, 357 U.S. 493, 499 (1958) (“exceptions to...warrant have been jealously and carefully drawn”). Therefore, the Court should be wary of creating new exceptions.

Neither Officer Moe nor Officer Barrera had a warrant at the time they detained Ms. Lopez, went into Ms. Lopez’s car, grabbed her purse, and searched through it. Thus, the only way that the search of Ms. Lopez’s purse could be considered reasonable, and therefore constitutional, is if there was an established exception to the warrant requirement that authorized the officers’ search. There was not. The only exception that could arguably apply to this case is the search incident to arrest exception, but after

*Arizona v. Gant* even that exception does not authorize the search. Other exceptions to the warrant requirement are also based on officer safety or evidentiary concerns, *Arizona v. Gant*, 556 U.S. 332, 346 (2009), but neither of those concerns is present here.

Therefore, none of the established exceptions to the warrant requirement apply in this case. Because the exceptions to the warrant requirement are narrow, the Court should not create a new one and should hold the search of Ms. Lopez unconstitutional.

B. Under *Arizona v. Gant*, The Search Of Ms. Lopez Is Unconstitutional.

Based on the U.S. Supreme Court's holding in *Gant*, the searches of Ms. Lopez's vehicle and purse violated the Fourth Amendment. *Gant* clarifies when police may conduct a warrantless search incident to arrest, and the police in this case were prohibited from conducting a search. Prior to *Gant*, the controlling case law for searches incident to arrest in the vehicle context was *New York v. Belton*. *Belton* had been construed by lower courts to allow law enforcement to search the interior of a vehicle any time they made an arrest. *Id.* at 342. The *Gant* court rejected a broad reading of *Belton* and explained that searches incident to arrest are only justified "when safety or evidentiary concerns demand." *Id.* at 346. In the traffic offense context, the Court stated that, "[a] rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals." *Id.* at 345. The Supreme Court was particularly disturbed that a

broad reading of *Belton* authorized the police to search within “every purse, briefcase, or other container” within the arrestee’s vehicle. *Id.*

*Gant* held that a search incident to arrest is permissible only when the area searched is within the reach of the defendant or evidence of the crime of arrest is likely to be found in the area. *Id.* at 351. In *Gant*, the defendant was arrested for driving with a suspended license and placed in the back of a police car. *Id.* at 335. After the police arrested the defendant, they searched his vehicle and found cocaine in the pocket of his jacket on one of the car seats. *Id.* The defendant was not within reach of his vehicle and could not pull out a weapon endangering officer safety or destroy evidence within the vehicle. *Id.* The Court also found it unlikely that evidence of the crime of arrest would be found within the defendant’s vehicle because the defendant was arrested for a traffic violation. *Id.* at 343. Thus, because no exceptions to the warrant requirement exists absent danger to officer safety or risk that evidence will be destroyed, the Court held the search unconstitutional. *Id.* at 339, 351. The search of Ms. Lopez’s belongings was similar to the search in *Gant*. Because there was no possibility that Ms. Lopez could reach into her vehicle, “both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.” *Id.* at 339; *see also People v. Evans*, 200 Cal. App. 4th 735, 745 (2011) (search impermissible when arrestee outside of vehicle and under police control).

1. Ms. Lopez was arrested, and the police searched beyond the permissible scope for searches incident to arrest.

Because Ms. Lopez was arrested, the police were limited in their constitutional ability to search her car and purse. When a suspect is arrested, searches of the suspect are limited by the scope of the search-incident-to arrest exception as articulated in *Gant*. We know Ms. Lopez was under arrest because she was both restrained and submitted to police assertion of authority. *United States v. Mendenhall*, 446 U.S. 544, 553 (1980); *California v. Hodari D.*, 499 U.S. 621, 626 (1991). In *Mendenhall*, the U.S. Supreme Court held that the defendant was not seized under the Fourth Amendment when she was asked by the police to voluntarily accompany them to a private room in the airport and the police did not threaten her or make a show of force. *Mendenhall*, 446 U.S. at 545. The Court held that as long as an objectively reasonable defendant would feel free to walk away, they are not seized. *Id.* at 554. In *Hodari D.*, the Court held that a fleeing suspect was not arrested until he was tackled by a police officer because an arrest only occurs when police use physical force or the suspect submits to police authority. 499 U.S. at 626.

Unlike *Mendenhall*, where the defendant could simply walk away, Ms. Lopez was not free to simply walk away. Ms. Lopez attempted to walk away from Officer Moe and tried to pull away when he restrained her but was not allowed to leave. (RT 37-38) Furthermore, unlike the fleeing defendant in *Hodari D.*, Ms. Lopez was placed in a control hold and handcuffed by Officer Moe. (RT 34). In fact, Officer Moe continued to hold Ms. Lopez at the back of her car while Officer Barrera searched it. (RT 39). Ms. Lopez was physically restrained and a reasonable person in view of all the circumstances

would not have felt free to leave. *Hodari D.*, 499 U.S. at 628. Therefore, Ms. Lopez was arrested, and the police exceeded their authority to search her.

2. The search of Ms. Lopez's vehicle was impermissible because the interior of her vehicle was out of her reach.

The search of Ms. Lopez violated her Fourth Amendment right to be free from unreasonable searches because she was not within reaching distance of the interior of her vehicle. *Gant*, 556 U.S. at 343. Officer Moe thus searched beyond the scope of what the search incident to arrest exception allows. As stated above, the limitations on the scope of a search incident to arrest are based on the underlying purposes of protecting officers and safeguarding evidence of the offense of arrest. *Id.* at 339 (referencing the rationales in *Chimel v. California*, 395 U.S. 752 (1969)). Applying *Gant*, the California Court of Appeal in *Evans* held that when an arrestee was "detained" on the ground outside of his vehicle, he "did not have access to the car's interior." 200 Cal. App. 4th at 745. *Evans*, therefore, held that the search was impermissible under *Gant*. *Id.* at 756.

Like the defendants in *Gant* and *Evans*, Ms. Lopez could not reach the interior of her vehicle and so could not retrieve any weapon from it. Officer safety interests were thus not advanced by searching the vehicle. Additionally, Ms. Lopez was held at the back of her vehicle in handcuffs at the time of the search and was incapable of endangering anyone. Indeed, Ms. Lopez was alone and facing three police officers who were presumably armed. (RT 8). It is also likely that Ms. Lopez, who is 5'4", was physically smaller than the officers. (CT 1). Hence, even were Ms. Lopez not handcuffed, the danger to officer safety would still be insufficient to justify the search. Relatedly, because

Ms. Lopez was restrained and handcuffed by Officer Moe outside of her car, there was no way she could reach into the vehicle and destroy evidence inside of it.

3. The search of Ms. Lopez’s vehicle was impermissible because there is no credible argument that there was any evidence for the officers to find.

The search of Ms. Lopez violated her Fourth Amendment right to be free from unreasonable searches because it was not “reasonable to believe that evidence of the offense of arrest might be found in the vehicle.” *Gant*, 556 U.S. at 335; *see also Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in judgment). Where, as here, a suspect may have committed a traffic offense, police cannot reasonably expect to find evidence of the crime of arrest within the arrestee’s vehicle. *Gant*, 556 U.S. at 343-44; *see also Evans*, 200 Cal. App. 4th at 750 (“*Gant* teaches that ‘traffic violation[s]’ do not provide a reasonable basis to search [for evidence]”). Like the defendant in *Gant*, 556 U.S. at 344, Ms. Lopez was initially arrested for a traffic violation, rather than a crime such as a drug offense for which physical evidence can be found. *Id.*; (RT 34.)

Just as the U.S. Supreme Court found that the police could not expect to find any evidence of *Gant*’s crime within his vehicle, Officer Moe could not reasonably expect to find evidence of Ms. Lopez’s crime within her vehicle. It would be impossible for Officer Moe to find physical evidence that Ms. Lopez drove without a license because driving without a license requires that she not have a license. Hence, searching for evidence of that crime implies searching for the nonexistence of an object (i.e. her license). Once Ms. Lopez said she did not have a license, the police had all the evidence they needed in order to arrest her. Additionally, just as a California Court of Appeal prohibited a search when

the defendant in *Evans* was arrested for a traffic offense, this Court should apply *Gant* and hold that the search of Ms. Lopez was unconstitutional when the only offense that Officer Moe knew about was a traffic offense. There was no valid reason for the police to search within her vehicle and thus the search was impermissible under the search incident to arrest exception.

C. Even If *Gant* Does Not Control, The Search Of Ms. Lopez’s Vehicle Violates *Knowles* And *Macabeo*.

Even if the U.S. Supreme Court’s holding in *Gant* does not control, the search of Ms. Lopez’s vehicle is illegal under *Knowles v. Iowa* and this Court’s holding in *People v. Macabeo*. That is, if Ms. Lopez was not arrested, the safety and evidentiary rationales that underlie the search incident to arrest exception are absent and cannot justify the search. *Knowles v. Iowa*, 525 U.S. 113, 117 (1998).

In *Macabeo*, this Court stated that “it is the fact of the arrest that justifies the search” and consequently, where the defendant is not arrested there is no justification for the search. *People v. Macabeo*, 1 Cal.5th at 1214. Furthermore, citizens have greater reasonable expectations of privacy before they are arrested than after. *Maryland v. King*, 569 U.S. 435, 463 (2013) (“reduced expectation of privacy” post-arrest). Therefore, if Ms. Lopez was not arrested the search was even less reasonable.

In *Knowles*, the U.S. Supreme Court held that the search of the defendant’s vehicle after the defendant was given a citation for a traffic violation was unconstitutional. 525 U.S. at 114. The Court reasoned that the officers did not have a warrant and the policy rationales for a search incident to arrest (i.e. officer safety and preservation of evidence)

were absent or minimal in the case of a citation. *Id.* at 117. The Court recognized that in cases of citations the threat to officer safety is less than during a custodial arrest. *Id.* Thus, the Court held that “the concern for officer safety in this context may justify the ‘minimal’ additional intrusion of ordering a driver and passengers out of the car, [but] does not by itself justify the often considerably greater intrusion attending a full field-type search.” *Id.* The high court also noted that officers have other methods, aside from searching the vehicle, to ensure their safety. *Id.* at 117-18. Moreover, the Court noted that because the infraction was a traffic violation there would not be evidence of the violation in the vehicle. *Id.* at 118. Therefore, the justification of evidence preservation is inapplicable to this case.

In *Macabeo*, this Court held that a defendant’s failure to stop at a stop sign was “analogous to *Knowles*” because the defendant was not arrested and thus, there was no justification to search him. *Macabeo*, 1 Cal.5th at 1219. After pulling over the defendant, the police searched his phone and subsequently arrested him. *Id.* at 1212. The defendant moved to suppress evidence of a separate crime that the police found on his phone. *Id.* The trial court denied the motion based on the argument that the defendant could have been arrested, and this Court reversed. *Id.* This Court relied on the U.S. Supreme Court’s holding in *Knowles* and stated that if a defendant is not arrested, the underlying justifications for a search incident to arrest (i.e. officer safety and evidence preservation) do not exist and the search was therefore invalid. *Id.* at 1219.

Just as in *Knowles* and *Macabeo*, Ms. Lopez was stopped for a traffic violation, so the risk to officer safety was too minimal to justify the search of her vehicle. Just as the



court observed in *Knowles*, 525 U.S. at 117, that officers have other ways of ensuring their safety, the officers who searched Ms. Lopez had other ways of protecting themselves as well. Specifically, if the officer had reasonable suspicion to believe Ms. Lopez was armed and dangerous, they could have conducted a *Terry* “patdown” to check for weapons. *Id.* at 118; *see also Terry v. Ohio*, 392 U.S. 1, 30 (1968). Officers can also order suspects to get out of their vehicles. *Knowles*, 525 U.S. at 117-18. Because Ms. Lopez was already outside of her car when she was approached by Officer Moe, the risk to officer safety was minimal.

Also, like the defendant in *Knowles*, the police could not reasonably expect to find evidence of Ms. Lopez’s traffic violation (i.e. driving without a license) within her vehicle. *Id.* at 118. Like the defendant in *Knowles*, to whom the police had already given a citation, the officers in this case already had all the evidence they needed to write a citation and had no need to search the interior of Ms. Lopez’s vehicle. *Id.*; *see also Macabeo*, 1 Cal. 5th at 1206. It does not matter that Ms. Lopez had not yet been cited because in *Macabeo* this Court held the search of the defendant was unreasonable even though the police never issued a citation. 1 Cal. 5th at 1224. Therefore, the search of Ms. Lopez was unconstitutional.

D. The Court of Appeal Erred In Applying *Arturo D.* Because It Has Been Overruled by *Gant*.

The Court of Appeal erred in relying on *Arturo D.* because the U.S. Supreme Court’s decision in *Gant* overruled it. After *Gant*, if anything remains of *Arturo D.*, it is only that police may search for a defendant’s identification when there is risk to officer

safety or there is the possibility that evidence can be found in the vehicle. *In re Arturo D.*, 27 Cal. 4th 60, 79 (2002); *but see Gant*, 556 U.S. at 335; *Knowles*, 525 U.S. at 118; *Macabeo*, 1 Cal. 5th at 1224.

In *Arturo D.*, the Court held that a limited search of a vehicle for registration or identifying information was reasonable under the Fourth Amendment. The Court stated, “[a]bsent contrary direction from the high court...longstanding authority...permit[s] a police officer to conduct...a limited warrantless search of a vehicle for required regulatory documentation.” *In re Arturo D.*, 27 Cal. 4th at 75-76. The *Arturo D.* Court based its holding on the governmental interest in finding a suspect’s documentation prior to citation. *See Id.* at 83-86. *Arturo D.* recognized that suspects have a decreased expectation of privacy in their vehicles and favored the government’s interest in finding identifying documents.

However, since that decision, *Gant* has clarified police officers’ ability to search absent a warrant when they stop a suspect for a traffic violation. The *Gant* Court found that in such a context, the privacy interests of the suspect deserved greater weight than the government interest in performing a search. 556 U.S. at 344-45. The Court rejected a rule allowing police to search “every purse, briefcase, or other container” whenever they stop someone for a traffic offense. *Id.* The *Gant* Court specified exactly when police may conduct a search in the traffic offense context and provided no carve-outs for the types of searches authorized by *Arturo D.* Because *Gant*’s holding is incompatible with *Arturo D.*, *Arturo D.* is no longer good law, and the Court of Appeal erred in applying it.

## Applicant Details

First Name	Rachel
Middle Initial	I
Last Name	Katzin
Citizenship Status	U. S. Citizen
Email Address	<a href="mailto:rkatzin@uchicago.edu">rkatzin@uchicago.edu</a>
Address	<div> <div>Address</div> <div> <div>Street</div> <div>20988 Cipres Way</div> <div>City</div> <div>Boca Raton</div> <div>State/Territory</div> <div>Florida</div> <div>Zip</div> <div>33433</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	5617020571

## Applicant Education

BA/BS From	Washington University in St. Louis
Date of BA/BS	May 2019
JD/LLB From	The University of Chicago Law School
	<a href="https://www.law.uchicago.edu/">https://www.law.uchicago.edu/</a>
Date of JD/LLB	June 11, 2022
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Chicago Journal of International Law
Moot Court Experience	No

## Bar Admission

## Prior Judicial Experience

Judicial Internships/ Externships	<b>Yes</b>
Post-graduate Judicial Law Clerk	<b>No</b>

### **Specialized Work Experience**

### **Recommenders**

Strahilevitz, Lior  
lior@uchicago.edu  
773-834-8665

Ginsburg, Tom  
tginsbur@law.uiuc.edu  
217-244-7614

Levmore, Saul  
s-levmore@uchicago.edu  
773-702-9494

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**RACHEL ILYSSA KATZIN**

rkatzin@uchicago.edu | 20988 Cipres Way, Boca Raton, FL 33433 | (561) 702-0571

March 13, 2022

The Honorable Lewis J. Liman  
U.S. District Court for the Southern District of New York  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, Room 701  
New York, New York 10007

Dear Judge Liman,

As an East Coast native planning to establish a legal career in New York, I am excited to apply for a clerkship in your chambers for the 2024 judicial term. I am a third-year J.D. candidate at the University of Chicago Law School with a background in public service and writing. In a clerkship, I seek intellectual rigor, workplace collegiality, and mentorship. In return, I am confident I would demonstrate a dedicated work ethic, amiable temperament, and thoughtful legal analysis. I admire your background as an Assistant United States Attorney and in private practice and would be thrilled to develop both as a lawyer and a public servant in your chambers. It would be a privilege to work with you, staff, and co-clerks to serve the people of the Southern District of New York.

My interest in clerking began during my 1L summer internship at the U.S. Department of Justice, Civil Division. As an intern, I engaged in collaborative writing, bouncing ideas amongst colleagues to make legal arguments more concise and persuasive. I also sharpened my legal reasoning skills by drafting documents for the Department's trial teams. These assignments included briefs, motions, and memoranda spanning both state and federal issues. Since then, I have fine-tuned my editing and analytic skills on the *Chicago Journal of International Law*, first as a Staff Member and now as a Comments Editor. In these roles, I have learned the importance of double- and triple-checking work to ensure facts are accurate and cited rules remain good law. Last summer, as a summer associate at Gibson, Dunn & Crutcher LLP in New York, I solidified my interest in commercial litigation and civil procedure and, in doing so, reinforced my strong interest in clerking on the district court level.

I hope to support the work of your chambers during the 2024 judicial term, by which time I will have two years of law firm experience. Please note that grades for the Autumn 2021 and Winter 2022 quarters are pending and will be forwarded once available. In addition to the enclosed materials, letters of recommendation from Professors Tom Ginsburg, Saul Levmore, and Lior Strahilevitz will arrive under separate cover. I am happy to provide any additional information at your request. Thank you very much for your consideration.

Sincerely,



Rachel Katzin

## RACHEL ILYSSA KATZIN

rkatzin@uchicago.edu | 20988 Cipres Way, Boca Raton, FL 33433 | (561) 702-0571

### EDUCATION

**The University of Chicago Law School**; Chicago, IL

*J.D. Candidate*, Expected June 2022

- JOURNAL: *Chicago Journal of International Law*, Comments Editor
- ACTIVITIES: Jewish Law Students Association, President; Law Women's Caucus, 2L Representative; Careers in Law Mentorship Program, Mentor; Diversity Leadership Network, Jewish Students' Representative

**Washington University in St. Louis**; St. Louis, MO

*B.A. with College Honors in Political Science*, May 2019

- HONORS: PRAXIS Scholar (selected to pursue an application-based practical business and communications certificate), Dean's List, Pi Sigma Alpha Political Science Honor Society, Psi Chi Psychology Honor Society
- ACTIVITIES: Consult Your Community, Project Manager, Consultant; Alpha Kappa Psi, Director of Recruitment and Membership; Alpha Epsilon Phi, Events Chair; Washington University Student Life Newspaper, Staff Writer

**Hansard Society Scholars Programme**; London, England

*Certificate of Completion*, May–July 2017

- Selected as one of sixteen students globally to participate in a study abroad program hosted by the United Kingdom's leading parliamentary think tank, the Hansard Society
- Studied Comparative British Government at The London School of Economics & Political Science and completed an internship at the Parliament of the United Kingdom with a member of the Scottish National Party

### EXPERIENCE

**Judge John F. Kness, Northern District of Illinois**; Chicago, I.L.

*Judicial Extern*, March 2022–Present

**Gibson, Dunn & Crutcher LLP**; New York, N.Y.

*Summer Associate*, June–August 2021 (Return Offer Extended)

- Drafted memoranda on complex areas of federal law, including municipal liability, defamation, and forfeiture
- Conducted wide-ranging legal research for use in court filings, trial strategy, and oral argument
- Authored an article for submission to academic publications
- Attended client meetings, team strategy meetings, and court hearings to thoroughly understand the trial process

**U.S. Department of Justice, Civil Division, Aviation, Space & Admiralty Litigation Section**; Washington, D.C.

*Summer Legal Intern*, June–August 2020

- Researched substantive issues of state law, such as Puerto Rico's recklessness standard, and federal jurisdictional issues, such as the discretionary function exception to the Federal Tort Claims Act, for a motion to dismiss
- Analyzed potential liability following a radiological space incident under existing insurance schemes, federal and state statutes, and precedent surrounding ultrahazardous activities
- Composed a memorandum identifying the elements, pleading standards, and possible defenses for multiple counts of breach in a maritime contract dispute

**Dewey Square Group**; Washington, D.C.

*Communications Department Intern*, June–August 2018

- Drafted opinion pieces and press releases to supplement strategies for advancing or challenging pending legislation
- Conducted in-depth socioeconomic analyses to develop strategic media responses for corporate and political clients
- Fact checked, reviewed, and edited strategy briefs and memoranda for accuracy and proper journalistic style

**Office of Member of Parliament ("MP") Hannah Bardell, SNP**; London, England

*Parliamentary Intern at the House of Commons of the United Kingdom*, May–July 2017

- Authored petitions, Prime Minister's Questions, and Early Day Motions for the MP's presentation in the House of Commons in advocacy for an immigrant constituent seeking asylum
- Prepared detailed reports on the history and trends of Scottish industry to prepare the MP for the upcoming term
- Advised constituents facing discrimination-based bank account closures in communications and administrative acts

**Office of Congressman Ted Deutch**; Washington, D.C.

*Policy Intern at the U.S. House of Representatives*, June–July 2016

- Drafted constituent responses regarding specific legislation and issues, including gun control and *Citizens United*
- Supported legislative staff by researching pending bills in preparation for committee meetings and votes

### INTERESTS

Water sports, abstract painting on canvas, and jogging on the Chicago Lakefront Trail



Name: Rachel Ilyssa Katzin  
Student ID: 12248604

University of Chicago Law School

Academic Program History

Program: Law School  
Start Quarter: Autumn 2019  
Current Status: Active in Program  
J.D. in Law

External Education

Washington University in St. Louis  
Saint Louis, Missouri  
Bachelor of Arts 2019

EP or EF (Emergency Pass/Emergency Fail) grades are awarded in response to a global health emergency beginning in March of 2020 that resulted in school-wide changes to instruction and/or academic policies.

Beginning of Law School Record

		Autumn 2019		
Course	Description	Attempted	Earned	Grade
LAWS 30101	Elements of the Law William Baude	3	3	178
LAWS 30211	Civil Procedure I Emily Buss	3	3	177
LAWS 30311	Criminal Law Genevieve Lakier	3	3	178
LAWS 30611	Torts Saul Levmore	3	3	178
LAWS 30711	Legal Research and Writing Cree Jones Patrick Barry	1	1	178

		Winter 2020		
Course	Description	Attempted	Earned	Grade
LAWS 30311	Criminal Law Richard McAdams	3	3	178
LAWS 30411	Property Lior Strahilevitz	3	3	EP
LAWS 30511	Contracts Omri Ben-Shahar	3	3	EP
LAWS 30611	Torts Saul Levmore	3	3	178
LAWS 30711	Legal Research and Writing Cree Jones Patrick Barry	1	1	178

Spring 2020

Course	Description	Attempted	Earned	Grade
LAWS 30221	Civil Procedure II William Hubbard	3	3	EP
LAWS 30411	Property Lior Strahilevitz	3	3	EP
LAWS 30511	Contracts Douglas Baird	3	3	EP
LAWS 30712	Lawyering: Brief Writing, Oral Advocacy and Transactional Skills Cree Jones	2	2	EP
LAWS 43267	American Legal History, 1607-1870 Alison LaCroix	3	3	EP

Summer 2020

Honors/Awards  
The Chicago Journal of International Law, Staff Member 2020-21

Autumn 2020

Course	Description	Attempted	Earned	Grade
LAWS 42801	Antitrust Law Randal Picker	3	3	175
LAWS 53271	Contract Drafting and Review Joan Neal	3	3	176
LAWS 55503	Employee Benefits Law Meets Writing Project Requirement Designation:	3	3	179
LAWS 63402	Workshop: Public Law and Legal Theory Charles Wolf Philip Mowery Bridget Fahey Genevieve Lakier Alison LaCroix John Rappaport Richard McAdams Adam Chilton Sonja Starr Ryan Doerfler Jennifer Nou Thomas Ginsburg Aziz Huq Hajin Kim Joshua C. Macey	0	0	P
LAWS 94130	The Chicago Journal of International Law Anthony Casey	1	1	P



Name: Rachel Ilyssa Katzin  
Student ID: 12248604

University of Chicago Law School

Winter 2021					Spring 2021						
Course		Description	Attempted	Earned	Grade	Course		Description	Attempted	Earned	Grade
LAWS	40101	Constitutional Law I: Governmental Structure William Baude	3	3	177	LAWS	40201	Constitutional Law II: Freedom of Speech Geoffrey Stone	3	3	176
LAWS	43218	Public Choice Saul Levmore	3	3	176	LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Genevieve Lakier	3	3	176
LAWS	46101	Administrative Law Jennifer Nou	3	3	179	LAWS	53497	Editing and Advocacy Patrick Barry	2	2	P
LAWS	53494	Equality as a Human Right Claudia Flores	2	2	180	LAWS	53499	Advanced Advocacy: Building and Using Your Advocate's Toolbox Robert Cheifetz	2	2	180
LAWS	63402	Workshop: Public Law and Legal Theory Bridget Fahey Genevieve Lakier Alison LaCroix John Rappaport Richard Mcadams Adam Chilton Sonja Starr Ryan Doerfler Jennifer Nou Thomas Ginsburg Aziz Huq Hajin Kim Joshua C. Macey	0	0	P	LAWS	63402	Workshop: Public Law and Legal Theory Bridget Fahey Genevieve Lakier Alison LaCroix John Rappaport Richard Mcadams Adam Chilton Sonja Starr Ryan Doerfler Jennifer Nou Thomas Ginsburg Aziz Huq Hajin Kim Joshua C. Macey	1	1	P
LAWS	94130	The Chicago Journal of International Law Anthony Casey	1	1	P	LAWS	94130	The Chicago Journal of International Law Req Meets Substantial Research Paper Requirement Designation: Anthony Casey	1	1	P





Name: Rachel Ilyssa Katzin  
Student ID: 12248604

University of Chicago Law School

Winter 2022					
Course	Description		Attempted	Earned	Grade
LAWS 42301	Business Organizations M. Todd Henderson		3	3	178
LAWS 45001	Family Law Mary Anne Case		3	0	
LAWS 53208	Public Corruption and the Law David Hoffman		2	0	
LAWS 53221	Current Issues in Criminal and National Security Law Michael Scudder Patrick Fitzgerald		3	0	
LAWS 90216	Employment Law Clinic Randall Schmidt		1	0	

Spring 2022

Honors/Awards  
Completed Pro Bono Service Initiative

End of University of Chicago Law School

OFFICIAL ACADEMIC DOCUMENT



Key to Transcripts  
of  
Academic Records

**1. Accreditation:** The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit <http://csl.uchicago.edu/policies/disclosures>.

**2. Calendar & Status:** The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

**3. Course Information:** Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

**4. Credits:** The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

- I **Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
- IP **Pass (non-Law):** Mark of I changed to P (Pass). See 8 for Law IP notation.
- NGR **No Grade Reported:** No final grade submitted
- P **Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
- Q **Query:** No final grade submitted (College only)
- R **Registered:** Registered to audit the course
- S **Satisfactory**
- U **Unsatisfactory**
- UW **Unofficial Withdrawal**
- W **Withdrawal:** Does not affect GPA calculation
- WP **Withdrawal Passing:** Does not affect GPA calculation
- WF **Withdrawal Failing:** Does not affect GPA calculation
- Blank:** If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

- H Honors Quality
- P\* High Pass
- P Pass

**Grade Point Average:** Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: <http://registrar.uchicago.edu>.

**6. Academic Status and Program of Study:** The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

**7. Doctoral Residence Status:** Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a

University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

**Scholastic Residence:** the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

**Research Residence:** the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

**Advanced Residence:** the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

**Active File Status:** a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

**Doctoral Leave of Absence:** the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

**Extended Residence:** the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled *Pro Forma* does not extend the maximum year limit on registration.

**8. Law School Transcript Key:** The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P\*\* indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

\* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

**9. FERPA Re-Disclosure Notice:** In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar  
University of Chicago  
1427 E. 60<sup>th</sup> Street  
Chicago, IL 60637  
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website: <http://registrar.uchicago.edu>.

Revised 09/2016

# Official Academic Transcript from Washington University - St. Louis

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## Sending School Information

Washington University - St. Louis

University Registrar

One Brookings Drive

Campus Box 1143

St. Louis, MO 63130

Telephone: 314-935-5959

School Web Page: [www.wustl.edu](http://www.wustl.edu)

Accreditation: North Central Association of Colleges and Schools, The Higher Learning Commission (NCA-HLC)

## Student Information

Student Name: Katzin, Rachel Ilyssa

Numeric Identifier: 438507

Birth Date: Not Provided By the Sending School

Student Email: RACHELKATZIN@EMAIL.WUSTL.EDU

## Receiver Information

RACHELKATZIN1@GMAIL.COM

## Document Information

Transmitted On: Mon, 20 May 2019

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# Washington University in St. Louis

## Office of the University Registrar

Page 1 of 3

Record Of: **Katzin, Rachel Ilyssa**

Student ID Number: 438507

### Degrees Awarded:

A.B. MAJOR IN POLITICAL SCIENCE	MAY 17, 2019
MINOR IN AMERICAN CULTURE STUDIES	MAY 17, 2019
MINOR IN PSYCHOLOGICAL & BRAIN SCIENCES	MAY 17, 2019

Transcript Issued 05/20/2019 To:

RACHEL KATZIN  
RACHELKATZIN1@GMAIL.COM  
STUDENT EMAIL: RACHELKATZIN@EMAIL.WUSTL.EDU

### Summer Semester 2014

INTRODUCTION TO THE WORLD'S RELIGIONS	RE ST	L23 1150	3.0	A
SOCIAL PROBLEMS AND SOCIAL ISSUES	AMCS	L98 120	3.0	A

Enrolled Units 6.0 Semester GPA 4.00 Cumulative Units 6.0 Cumulative GPA 4.00

### Fall Semester 2015

LITERATURE SEMINAR FOR FRESHMEN: LITERATURE AND BLASPHEMY	E LIT	L14 154	3.0	A
SOLAR SYSTEM ASTRONOMY	PHYSICS	L31 125A	3.0	A-
PSYCHOLOGY OF YOUNG ADULTHOOD: COLLEGE YEARS	PSYCH	L33 105	1.0	CR#
INTRODUCTION TO WOMEN, GENDER, AND SEXUALITY STUDIES	WGSS	L77 100B	3.0	A
FRESHMAN SEMINAR: MAPPING THE WORLD: INTRODUCTION TO HUMAN GEOGRAPHY	IAS	L97 155	3.0	A

Enrolled Units 13.0 Semester GPA 3.93 Cumulative Units 28.0 Cumulative GPA 3.95

### Spring Semester 2016

PRESENT MORAL PROBLEMS	PHIL	L30 131F	3.0	B+
INTRODUCTION TO COMPARATIVE POLITICS	POL SCI	L32 102B	3.0	A
INTERNATIONAL POLITICS	POL SCI	L32 103B	3.0	A-
JUST DO IT! SKILLS THAT TURN PASSION INTO POLICY	POL SCI	L32 227	1.0	CR#
INTRODUCTION TO PSYCHOLOGY	PSYCH	L33 100B	3.0	A-
COLLEGE WRITING 1	CWP	L59 100	3.0	A

Enrolled Units 16.0 Semester GPA 3.74 Cumulative Units 44.0 Cumulative GPA 3.85

### Fall Semester 2016

JUST DO IT! RUNNING FOR POLITICAL OFFICE	POL SCI	L32 227	1.0	CR#
POLITICAL INTOLERANCE IN WORLD POLITICS	POL SCI	L32 3280	3.0	B+
LAW, POLITICS AND SOCIETY	POL SCI	L32 358	3.0	A
QUANTITATIVE POLITICAL METHODOLOGY	POL SCI	L32 363	3.0	A-
INTRODUCTION TO THE PSYCHOLOGY OF AGING	PSYCH	L33 326	3.0	W
LEADERS IN CONTEXT	PRAXIS	L62 201	3.0	A

Enrolled Units 13.0 Semester GPA 3.75 Cumulative Units 57.0 Cumulative GPA 3.83

### Spring Semester 2017

CONSTITUTIONAL LAW	POL SCI	L32 3431	3.0	B+
COMMUNICATION THAT WORKS	PRAXIS	L62 285	3.0	A
INTRODUCTION TO CONSERVATION BIOLOGY	ENST	L82 115	3.0	B+

Susan E. Hosack, University Registrar

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# Washington University in St. Louis

## Office of the University Registrar

Page 2 of 3

Record Of: **Katzin, Rachel Ilyssa**

Student ID Number: 438507

### Spring Semester 2017

WOLOF LANGUAGE AND CULTURE	AFAS	L90 1045	3.0	A
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Enrolled Units 12.0	Semester GPA 3.65	Cumulative Units 69.0	Cumulative GPA 3.79
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### Summer Semester 2017

OVERSEAS PROGRAM: APPROVED SUMMER STUDY ABROAD	OSP	L99 645	0
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Enrolled Units 0	Semester GPA 0	Cumulative Units 75.0	Cumulative GPA 3.79
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### Fall Semester 2017

PUBLIC OPINION AND AMERICAN DEMOCRACY	POL SCI	L32 3211	3.0	A
INTRODUCTION TO SOCIAL PSYCHOLOGY	PSYCH	L33 315	3.0	A
MUSIC COGNITION	PSYCH	L33 3211	3.0	A
ABNORMAL PSYCHOLOGY: THE MAJOR MENTAL DISORDERS	PSYCH	L33 354	3.0	B+
FLUENCY IN SOCIOTECHNOLOGY	PRAXIS	L62 207	2.0	A

Enrolled Units 14.0	Semester GPA 3.85	Cumulative Units 89.0	Cumulative GPA 3.80
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### Spring Semester 2018

ANCIENT HISTORY: THE ROMAN EMPIRE	CLASSICS	L08 342C	3.0	A-
CIVIL WAR AND PEACE	POL SCI	L32 3090	3.0	A
POSITIVE PSYCHOLOGY: THE SCIENCE OF HAPPINESS	PSYCH	L33 367	3.0	B
IMAGES OF DISABILITY IN FILM AND LITERATURE	AMCS	L98 245	3.0	A

Enrolled Units 12.0	Semester GPA 3.68	Cumulative Units 101.0	Cumulative GPA 3.78
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### Fall Semester 2018

WOMEN IN LEADERSHIP	OB	B66 400C	1.5	A
EXPOSITION	WRITING	L13 311	3.0	A
RACE AND ETHNICITY IN AMERICAN POLITICS	POL SCI	L32 3031	3.0	A
PRAXIS INTERNSHIP	PRAXIS	L62 299	0	A
THE AMERICAN SCHOOL	AMCS	L98 301C	3.0	A
THE COLD WAR, 1945-1991	AMCS	L98 3680	3.0	A-

Enrolled Units 13.5	Semester GPA 3.93	Cumulative Units 114.5	Cumulative GPA 3.80
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### Spring Semester 2019

INTRODUCTION TO MACROECONOMICS	ECON	L11 1021	3.0	B
DISABILITY, QUALITY OF LIFE & COMMUNITY RESPONSIBILITY	AMCS	L98 3755	3.0	A+

Enrolled Units 6.0	Semester GPA 3.50	Cumulative Units 120.5	Cumulative GPA 3.79
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### Remarks

FL2015 FROM: ADVANCED PLACEMENT ENGLISH COMPOSITION ELECTIVE	0 UNITS
FL2015 FROM: ADVANCED PLACEMENT HISTORY ELECTIVE	0 UNITS
FL2015 FROM: ADVANCED PLACEMENT WESTERN CIVILIZATION	0 UNITS
FL2015 FROM: ADVANCED PLACEMENT FREEDOM, CITIZENSHIP AND THE MAKING OF AMERICAN LIFE	0 UNITS
FL2015 FROM: TOTAL CREDIT GRANTED BY PREMATRICATION UNITS	9.0 UNITS

Susan E. Hosack, University Registrar

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# Washington University in St. Louis

Office of the University Registrar

Record Of: **Katzin, Rachel Ilyssa**  
Student ID Number: 438507

**Remarks**

SP2016 PRAXIS: TOOLS FOR THE WORLD OF WORK

**Distinctions, Prizes and Awards**

SP2016 DEAN'S LIST

FL2017 DEAN'S LIST

SP2018 PI SIGMA ALPHA - POLITICAL SCIENCE HONOR SOCIETY

SP2019 COLLEGE HONORS IN A&S

SP2019 PSI CHI - PSYCHOLOGY HONOR SOCIETY

\*\*\*\*\* END OF TRANSCRIPT \*\*\*\*\*

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**Washington University in St. Louis**

Office of the University Registrar  
One Brookings Drive, Campus Box 1143, St. Louis, MO 63130-4899 Telephone: 314-935-5959

**Transcript Nomenclature**

Transcripts issued by Washington University are a complete and comprehensive record of all classes taken unless otherwise indicated. Each page of the transcript begins with the student's name and Washington University student identification number. Transcript entries on the last page end with a line across the page indicating no further entries below this line.

The courses in which the student enrolled while at Washington University are listed in chronological order by semester. Each course is listed on a separate line beginning with the course title followed by the academic department abbreviation, course number, credit hours, and grade.

Honors, awards, administrative actions, and transfer credit are listed at the end of the document under "Distinctions, Prizes and Awards" and "Remarks".

**Course Numbering System**

In general course numbers indicate the following academic levels: Courses 100-199 = freshman; 200-299 = sophomore; 300-399 = junior; 400-500 = senior and graduate level; 501 and above primarily for graduate students.

**Unit of Credit**

Most schools at Washington University follow a fifteen-week semester calendar where the value of one unit of credit is equal to one hour of instruction. The minimum full-time load for undergraduates is generally twelve credit hours and nine credit hours for graduate students during the fall and spring semesters. Some graduate programs in Medicine, Law, and Business follow a one-year academic calendar. The Doctor of Medicine program uses clock hours instead of credit hours.

**Degrees Awarded and Programs of Study**

Degrees conferred by Washington University and current programs of study appear on the first page of the transcript. The Degrees Awarded notation lists the date of award, the specific degree(s) awarded and the major field(s) of study.

**Academic and Disciplinary Notations**

Probation: Academic probation occurs when in the judgment of the school and the faculty the student's work is of unsatisfactory quality. A student may also be placed on probation following a ruling of the Judicial Administrator and/or other University judicial bodies for misconduct.

Suspension: A student may be suspended from student status if the student's work is of unsatisfactory quality, or for misconduct, and not permitted to register.

Expulsion: This action constitutes the permanent removal from student status at the University.

**Grading Systems**

Most schools within Washington University follow the grading and point value system indicated in the Standard column below. However, each school may elect to use unique grading options. Similarly, not all schools at the University choose to display GPA information on the transcript. Cumulative GPA and unit totals may not fully describe the status of students enrolled in dual degree programs of study, particularly those involving schools which use different grading scales. Consult the specific school or program at Washington University for additional information.

**Washington University Grading Systems**

	Grades	Standard Points	Engineering Pts (before FL2010)	Social Work (before FL09)	Social Work (since FL09)	MBA Points (where applicable) (GB before Fall 1998)	MBA Points (GB since Fall 1998)
Superior	A+/A	4.0	4.0	3.0	4.0	2.0	4.0
	A-	3.7	4.0	2.7	3.7	1.7	3.7
	B+	3.3	3.0	2.3	3.3	1.3	3.3
Good	B	3.0	3.0	2.0	3.0	1.0	3.0
	B-	2.7	3.0	1.7	2.7	0.7	2.7
	C+	2.3	2.0	1.3	2.3	0.3	2.3
Average	C	2.0	2.0	1.0	2.0	0.0	2.0
	C-	1.7	2.0	0.7	1.7		1.7
	D+	1.3	1.0	0.0	0.0		
Passing	D	1.0	1.0		0.0		
	D-	0.7	1.0		0.0		
Failing	F	0.0	0.0		0.0		

**Additional Grading Information:**

P/P#	Pass	L	Successful Audit	H	Honors	S	Satisfactory	I	Incomplete	R	Course Repeated
F/F#	Fail	Z	Unsuccessful Audit	HP	High Pass	IP	In Progress	N	No Grade Reported	W	Withdrawal
CR/CR#	Credit (Pass)			LP	Low Pass	U	Unsatisfactory	X	No Exam Taken		
NC/NCR/NCR#	No Credit (Fail)			NP	No Pass	E	Unusually High Distinction				

School of Law: Please use the attached explanation of School of Law grading system.

(revised 8/2016)

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RACHEL ILYSSA KATZIN

rkatzin@uchicago.edu | 20988 Cipres Way, Boca Raton, FL 33433 | (561) 702-0571

REFERENCE LIST

**Lior Strahilevitz**, Sidley Austin Professor of Law  
The University of Chicago Law School  
(773) 834-8665 | lior@uchicago.edu

**Jill Rosa**, Senior Trial Counsel  
U.S. Department of Justice, Civil Division  
(847) 732-1141 | Jill.Rosa@usdoj.gov

**Bethany Saul**, Associate Attorney  
Gibson, Dunn & Crutcher LLP  
(212) 351-6298 | BSaul@gibsondunn.com



**Professor Lior J. Strahilevitz**  
*Sidley Austin Professor of Law*  
The University of Chicago Law School  
1111 E. 60th Street  
Chicago, IL 60637  
[lior@uchicago.edu](mailto:lior@uchicago.edu) | 773-834-8665

March 22, 2022

The Honorable Lewis Liman  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, Room 701  
New York, NY 10007-1312

Dear Judge Liman:

Rachel Katzin, a second-year student at the University of Chicago Law School, is a talented student and a warm person with outstanding analytical skills. She has performed at a high level in Chicago's academically intense environment and brims with infectious enthusiasm for studying the law. It is a pleasure to recommend her for a clerkship in your chambers.

Rachel was one of the stronger students in my 1L Property class. Rachel's exam expressed her thoughts with elegance and wasted few words. Her exam displays a fluency in simultaneously juggling many difficult issues and shows a real knack for reconciling tension in the case law in a persuasive way. Having just re-read her answers, her penchant for identifying legal issues and dealing with them succinctly stands out, as does the clarity of Rachel's prose and organization. Because of the pandemic, we were forced to shift to mandatory pass-fail grading during the spring quarter, and that applied even to my two-quarter Property offering, which has a single exam at the end of the spring exam period. Had I graded Rachel's examination on our traditional numerical grading scale, with its strict curve, she would have been right on the border between a 179 and 180 grade. That's a meaningful achievement because a 179 grade point average at Chicago represents our *cum laude* cutoff, and we seem to be the rare (or only?) elite law school that remains allergic to grade inflation these days.

My Property class was taught using the Socratic method, and students were called on randomly. Every time I called on Rachel, she gave answers reflecting preparation, insight, and an ability to think on her feet quickly. Rachel was also a regular and constructive contributor to class discussion, asking the kinds of questions that moved the discussion forward. When Rachel's hand went up, I expected that I was about to hear something interesting or helpful; I was never disappointed. Rachel does not talk in class for the sake of talking in class. Instead, she talks when she has something interesting to say. That is a novel concept for too many law students.

Rachel has an interesting background and a lively, adventurous, funny, and extraverted personality. She is very extroverted, confident, and generous to her peers, and she displays uncommon leadership ability. Rachel was raised in a tight-knit Jewish family in South Florida. Both her grandfathers served in the Navy during the Second World War, and she is the daughter of a dental hygienist mom and a neurologist dad. She was extremely close to her later maternal grandmother, who was born in a New York City housing project before moving to Baltimore and instilled in Rachel a love of baking and arts & crafts. Rachel is one of four children, and presently the only one who does not live in New York. There is a refreshing lack of pretense about her interactions with faculty and peers. Over the summer, long after grades had been handed in, she emailed me an impromptu list of activities that might keep my kids occupied during the pandemic. They were, unsurprisingly, good suggestions as Rachel drew on her experiences working at summer camps.

Getting to know Rachel outside of class has been a joy. Rachel has always struck me as highly motivated, organized, upbeat, and open-minded. I know she will be a delightful presence in chambers. She is a very well-rounded person with a seemingly limitless reserve of energy. Even through the dead of winter, she goes on very long, almost daily walks on Chicago's lakefront trail or through its neighborhoods.

Rachel relishes the chance to form friendships with people who think about the world differently than she does. As President of the Jewish Students association on our campus, she has tried doggedly to make sure that the group maintains an apolitical stance so that it can be a home for students from across the ideological spectrum. She has worked hard to build community despite the challenges of the pandemic, organizing the distribution of "grab and go" Sabbath meals for students. Rachel is a people person, and she will often show up for a friend having a tough time with freshly baked bagels, focaccia, or soft pretzels. She is a considerate and loyal person.

To summarize, Rachel is smart, accomplished, diligent, friendly, and skilled. Rachel plans to become a litigator, and she will be spending her 2L summer with some of the best, at Gibson Dunn. Rachel will be an outstanding attorney, and I fully expect her to be both a very strong law clerk and a wonderful member of your family of clerks.

Sincerely,  
Lior J. Strahilevitz  
Sidley Austin Professor of Law

Lior Strahilevitz - [lior@uchicago.edu](mailto:lior@uchicago.edu) - 773-834-8665

**Professor Tom Ginsburg**

*Leo Spitz Professor of International Law,  
Ludwig and Hilde Wolf Research Scholar  
and Professor of Political Science*  
The University of Chicago Law School  
1111 E. 60th Street  
Chicago, IL 60637  
[tginsburg@uchicago.edu](mailto:tginsburg@uchicago.edu) | 773-834-3087

March 22, 2022

The Honorable Lewis Liman  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, Room 701  
New York, NY 10007-1312

Dear Judge Liman:

It is my pleasure to recommend Rachel Katzin, a member of the class of 2022 at the Law School who is an applicant for a clerkship in your chambers. Rachel is a terrific applicant. She is bright, hard-working and a terrific writer, and I recommend her very highly.

While I have not taught Rachel in the classroom, I did supervise her Comment for the Chicago Journal of International Law, for which I am the faculty advisor. In her paper, *Defending Nations Against Needle Pricks: Reading in the Accumulation of Events Doctrine to Article 51*, Rachel took on a very interesting and topical issue in the law of armed conflict, namely the question of what constitutes an "armed attack" sufficient to trigger the right of self-defense articulated in Article 51 of the United Nations Charter. The Charter was written in a different era, in which war was primarily the province of standing armies and navies arrayed against each other in open combat. Today's conflicts among states look very different, and are less likely to have a clearly identifiable beginning and ending. This in turn makes classification of international legality more difficult, with consequences for how other states will respond.

Rachel examines the issue through the killing of General Qassim Soleimani by the United States, and whether it was justified as an act of self-defense. This in turn requires examining the state of relations between the United States and Iran in the period immediately prior to the strike. Rachel goes through a careful analysis, finding that the legal requirement of imminence was met, the requirement of necessity was likely not. Throughout, she is careful with her legal claims, spelling out the still-unknown factual predicates that might shift the analysis the other way. It is a strong work of legal analysis, well-written and well-researched.

My impression is that Rachel is the kind of "Chicago" student who is hungry for knowledge. She has organized a number of events for external speakers on Zoom, and has been active in student groups. She is well-organized, gets along with others, and a strong member of the community. I think of her as a highly motivated leader, who is eager to learn more from a judge and has the professional commitment to make a strong clerk. People seem to enjoy working with her, and I am confident that she would surely get along with others in your chambers.

The bottom line is that Rachel Katzin is a terrific law student, who will be a smart, hardworking, and focused clerk. I recommend her very highly and urge you to interview her.

Please do not hesitate to contact me for further information or detail.

Sincerely,  
Tom Ginsburg

Tom Ginsburg - [tginsbur@law.uiuc.edu](mailto:tginsbur@law.uiuc.edu) - 217-244-7614

**Professor Saul Levmore**

*William B. Graham Distinguished Service Professor of Law*  
The University of Chicago Law School  
1111 E. 60th Street  
Chicago, IL 60637  
[s-levmore@uchicago.edu](mailto:s-levmore@uchicago.edu) | 773-702-9590

March 22, 2022

The Honorable Lewis Liman  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, Room 701  
New York, NY 10007-1312

Dear Judge Liman:

Rachel Katzin, a second-year student here at the University of Chicago Law School, has told me of her great interest in meeting with you, and then clerking for you when the time comes. It is easy to write on her behalf. Despite the virus and its impact on Law School events, I feel like I know her enough to say that she will make a good, and even an unusually excellent, clerk.

But how do I reach this conclusion? First, she is smart, quick, and a pleasure to engage in conversation. She was in my two-term Torts class last year (while we still had grades, and hers were very good) and when I look back and think of all her contributions, they were to the point, correct, and often quite creative. They were also enough off the beaten path that I remember them now; I liked and appreciated her occasionally unusual insights. I remember one interaction in particular in which she suddenly wondered aloud why the gravitation to a negligence rule in Torts was not matched in Contract law (a course she was just beginning) which struck her (and me!) as more like strict liability. I referred her to an article on the subject – and a claim that judges awarded contract damages in a way that moved the system toward a kind of negligence rule, by pointing to features that made a breach seem less than efficient. I doubt she remembers this exchange or article, because she is too modest, but I certainly remember how impressed I was with her intellectual energy. I know this reason for my admiring her potential sounds awfully academic, but in talking to her about legal writing and other skills, I came to see that her strengths were practical more than academic. This tendency will serve her (and you) well as a clerk.

Second, I have often captured glimpses of how Rachel is well liked and popular with her classmates. In the beginning I thought this was because she had a demeanor that was not threatening (she came to law school straight from her undergraduate, political science experience), but as I have talked to her and observed her (she chooses to be an in-person student, much to my liking), I see that they like her for all the right reasons. She is friendly, a good listener, self-aware, insightful, and much more. People will envy her co-clerk, for the teammate and good friend she will certainly be.

As you can discern, if I were in your position I would interview her as soon as possible and then, unless it feels like a bad fit, I would look forward to having her as a clerk. She will be eager to learn from you, to improve her writing (which is already fairly good, insofar as I can tell), and to value the experience for all it can be.

Sincerely,  
Saul Levmore

Saul Levmore - [s-levmore@uchicago.edu](mailto:s-levmore@uchicago.edu) - 773-702-9494

**RACHEL ILYSSA KATZIN**

rkatzin@uchicago.edu | 20988 Cipres Way, Boca Raton, FL 33433 | (561) 702-0571

**WRITING SAMPLE**

The following writing sample is an excerpt from a brief I drafted for my Employee Benefits Law course in December 2020. The full brief argues two issues on appeal: (1) the district court improperly dismissed Plaintiff’s claim that Defendant structured the relevant contract in violation of the Employee Retirement Income Security Act of 1974 (“ERISA”) “evade or avoid” provision, and (2) the district court improperly granted summary judgment to Defendant on Plaintiff’s withdrawal liability claim due to an incorrect application of the theory of successorship liability. The selected excerpt discusses the former. I am happy to provide the full version of the brief at your request. If you wish to review the relevant district court opinion, please see *N.Y. State Teamsters Conference Pension and Ret. Fund v. C & S Wholesale Grocers, Inc.*, 2017 WL 1628896 (N.D.N.Y. May 1, 2017).

[The Table of Contents, Table of Authorities, Statement of Jurisdiction, and Statement of the Issues Presented for Review have been omitted for brevity.]

## V. STATEMENT OF THE CASE

### A. Statement of the Facts

#### 1. The Parties

Plaintiff Pension Fund represents 450 former employees who were fired by Penn Traffic when it filed for bankruptcy and closed its Syracuse warehouse. *See* Dkt. No. 28, First Amended Compl., at ¶ 73. Plaintiff is a “multiemployer plan,” meaning that it receives funds from numerous contributors. *See id.* at ¶ 9.

Penn Traffic is a third party food retail and wholesale company based out of Syracuse, New York. *See id.* at ¶ 16. It owned and operated two warehouses, one of which was the Syracuse warehouse. *See id.* at ¶ 17. Penn Traffic was a contributor to Plaintiff Pension Fund via “various collective bargaining agreements with Teamsters Local 317.” *See id.* at ¶ 20.

Defendant C&S is a national grocery wholesale company that was engaged in negotiations with Penn Traffic to acquire Penn Traffic’s wholesale distribution division. *See* Dkt. No. 28, at ¶¶ 13, 29.

#### 2. Undisputed Facts

Prior to filing for bankruptcy, Penn Traffic owned and operated about eighty retail grocers and a corresponding wholesale business supplying more than 100 independent retail grocery stores with grocery supplies. *See* Def.’s Stmt. of Undisputed Material Facts (“Def.’s Facts”) at ¶ 2–4. Upon filing for bankruptcy, Penn Traffic fired the 450 Syracuse employees represented by Plaintiff and ceased its pension fund contributions. This cessation of contributions ordinarily triggers withdrawal liability under ERISA. *See id.* at ¶ 73; 29 U.S.C. § 1381.

However, Defendant strategically structured its 2008 asset purchase agreement with Penn Traffic to avoid triggering or incurring Penn Traffic’s withdrawal liability. *See* Def.’s Facts at ¶ 42–43. Under the asset purchase agreement, Defendant acquired “Penn Traffic’s wholesale contracts, customers, equipment, files, records, goodwill, intellectual property, accounts retrievable, and employees dedicated to Penn Traffic’s wholesale distribution division who were not members of Teamsters Local 317.” *Id.* at ¶ 52. Defendant did not acquire Penn Traffic’s retail business, leases and subleases, cash, facilities, and, most notable here, employee benefit plans. *See* Miller Declaration Exhibit A at § 1.3(a)–(e). Defendant denies continued relations with the 450 fired union employees. *See* Miller Declaration Exhibit B at § 10. The contract provided that Penn Traffic would continue to bear responsibility for “all employees . . . and other liabilities associated with the Facilities and any other storage.” *See id.* at § 1.2.

Defendant and Penn Traffic subsequently entered into an additional agreement, under which Defendant utilized Penn Traffic’s Syracuse warehouse services as a subcontractor. *See* Def.’s Facts at ¶ 34. The relevant services included warehousing and distribution for and to Defendant’s wholesale customers. *See id.* at ¶ 31.

Plaintiff alleges that the Syracuse warehouse operations “were materially identical to what they would have been had [Defendant] formally acquired the entirety of Penn Traffic’s wholesale distribution.” *See* Dkt. No. 28, at ¶ 64. The key difference is that, under the agreement, Penn Traffic, not Defendant, remained responsible for the 450 employees of Teamsters Local 317. *See id.* Plaintiff alleges that the strategic drafting of Defendant’s asset purchase agreement was not mere business strategy, but rather that Defendant “modified the deal structure for no reason other than shirking pension obligations to the Syracuse employees and the Pension Fund.” *See id.* at ¶¶ 24–28, 64.

Finally, during its post-bankruptcy asset liquidation, Penn Traffic closed its Syracuse warehouse, officially withdrawing from Plaintiff Pension Fund. As a result, Penn Traffic incurred the still-unpaid withdrawal liability at issue. *See id.* at ¶¶ 47–49. Plaintiff estimates that Penn Traffic incurred approximately \$60 million in unpaid withdrawal liability, which Defendant has assumed under a theory of successorship liability.

### **3. Harm Caused to Plaintiff-Appellant by Defendant-Appellee’s Actions**

Once Penn Traffic declared bankruptcy, it ceased its required payments to Plaintiff. Defendant’s strategic drafting of its asset purchase agreement and evasion of successorship liability left Plaintiff’s represented employees without access to their rightful funds. This lack of access directly harms the employees represented by Plaintiff and Plaintiff itself.

[Section 3.B. Proceedings Below has been omitted for brevity.]

## **VI. SUMMARY OF THE ARGUMENT**

The district court wrongly dismissed, under Fed. R. Civ. P. 12(b)(6), Plaintiff’s allegation that Defendant violated ERISA’s “evade or avoid” provision. The transaction was structured to intentionally insulate Defendant from Penn Traffic’s withdrawal liability while simultaneously allowing Penn Traffic to avoid immediately triggering withdrawal liability for itself. The legislative history of ERISA makes plain that the “evade or avoid” provision was specifically meant to protect Pension Funds like Plaintiff and the employees it represents. This Court should reinstate Plaintiff’s claim on this issue.

In addition, the district court incorrectly granted summary judgment to Defendant on the issue of successorship liability. On balance, each of the three substantial continuity factors weighs in Plaintiff’s favor. At the very least, they do not weigh enough in Defendant’s favor to

warrant summary judgment at this stage. This Court should reverse the district court's grant of summary judgment to Defendant and remand this matter for further proceedings.

## VII. ARGUMENT

### A. Standard of Review

The district court's dismissal of Plaintiff's first claim is reviewed *de novo*. *Stratton v. McClure v. Morgan Stanley*, 776 F.3d 94, 100 (2015) ("We review *de novo* the district court's judgment granting Defendants' motion to dismiss."). This Court must reconsider whether Plaintiff has adequately pled facts that "plausibly give rise to an entitlement of relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). If Plaintiff has done so, this Court must reverse the district court's dismissal of Plaintiff's claim and remand the case for a full judgment on the merits.

The district court's grant of summary judgment to the Defendant is reviewed *de novo* for a determination whether the district court erred in finding no genuine issue in material fact. *See, e.g., Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465 n. 10 (1992) ("[O]n summary judgment we may examine the record *de novo* without relying on the lower courts' understanding. . . .") (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Summary judgment is only appropriate when there is no genuine issue of material fact. Fed. R. Civ. P. 56; *see Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). To determine whether summary judgment is appropriate, a court must view disputed facts in the light most favorable to the nonmovant (here, Plaintiff). *Scott v. Harris*, 550 U.S. 372, 380 (2007).

### B. The District Court Wrongly Dismissed Plaintiff's Claim that Defendant Violated ERISA's "Evade or Avoid" Provision

#### 1. Plaintiff's Allegation



Plaintiff alleges that “a principal purpose of the transaction undertaken by [Defendant] and Penn Traffic was to evade or avoid withdrawal liability, in violation of ERISA.” Dkt. No. 28 at ¶ 91. Plaintiff here claims that Defendant is directly liable for Penn Traffic’s unpaid withdrawal liability as well as “interests, costs, attorney’s fees and penalties.” Dkt. No. 28 at ¶ 92; *N.Y. State Teamsters Conference Pension and Ret. Fund v. C & S Wholesale Grocers, Inc.*, 2017 WL 1628896, at \*3 (N.D.N.Y. May 1, 2017).

## **2. The “Evade or Avoid” Provision of ERISA**

ERISA provides that “[i]f a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such a transaction.” 29 U.S.C. § 1392(c). The phrase “this part” refers to the rules surrounding an employer’s obligation to pay required contributions under withdrawal liability. *See* 29 U.S.C. § 1381. Under this provision, an employer may not intentionally structure a sale or other transaction with a purpose to avoid triggering withdrawal liability.

If a court finds that a transaction violates this provision, it may require the calculation and collection of necessary liability. *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049 (2d Cir. 1993) (holding that an acquisition provision barring the assumption of “any withdrawal liability of Seller under any multiemployer pension plan” violated ERISA’s “evade or avoid” provision). Specifically, “participat[ing] in a scheme, the principal purpose of which was to evade or avoid withdrawal liability by depriving [oneself] of funds sufficient to meet its pension liability” is sufficient to violate ERISA § 4212(c). *Id.* at 1056.

## **3. Defendant Violated ERISA § 4212(c) by Structuring the Asset Purchase Agreement with a Purpose to Evade or Avoid Withdrawal Liability**

The basic circumstances of this case resemble those of *Herrmann*. *Herrmann* involved an acquisition agreement and subsequent cessation of operations and “complete withdrawal from the Fund.” *Herrmann*, 9 F.3d at 1053. Here, Defendant acquired the vast majority of Penn Traffic’s wholesale business, which then related to a bankruptcy, a halting of operations, the firing of employees, and a withdrawal from Plaintiff Pension Fund.

The district court rightly adopted the Second Circuit’s reading of the “evade or avoid” provision in *Herrmann*, noting that this reading “comports with the plain language of the statute.” *N.Y. State Teamsters Conference Pension and Ret. Fund*, 2017 WL 1628896, at \*9; see *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). Accordingly, the mere fact that Penn Traffic technically retained withdrawal liability under the statute does not immunize Defendant from withdrawal liability or insulate Defendant from a violation of ERISA § 4212(c). The statute does not limit the violation to an *employer’s* attempt to evade or avoid liability. Rather, it broadly denotes that “any transaction” may violate the provision, implicitly including *any parties to the transaction*, whether they are the original employer or not, and whether they would otherwise be liable to a Pension Fund or not. See 29 U.S.C. § 1392(c).

The district court was also correct in determining that Plaintiff has a right to redress at the hands of the Court. Under the statute itself, the appropriate remedy for a violation of ERISA § 4212(c) is to determine and collect liability “without regard to [the relevant] transaction.” *Id.* The Court in *Herrmann* read this provision to require that the assets relevant to the defective transaction “must . . . be recoverable from the parties to whom they have been illegitimately transferred.” *Herrmann*, 9 F.3d at 1056.

The district court granted Defendant’s motion in part because “although Penn Traffic and Defendant might have structured the transaction so that Defendant could avoid the assumption of

Penn Traffic’s withdrawal liability, they did not structure the transaction so that Penn Traffic became immediately insolvent and unable to pay withdrawal liability.” *N.Y. State Teamsters Conference Pension and Ret. Fund*, 2017 WL 1628896, at \*10. However, nowhere in the statute or any precedent does it say that the intended effect must “immediately” take place in order for it to be sufficient to violate the “evade or avoid” provision. There is no evidence that Congress, or the courts, sought to interpret ERISA § 4212(c) to impose a time limit on the consequences of a violation. To read in such a limitation would only provide a tool for the structuring of future transactions, such that strategic parties need only delay filing for bankruptcy by some time period in order to immunize themselves from suit.

#### **4. Plaintiff’s Allegations Meet the Standard to Pass the Pleadings Stage**

The district court erred in finding that Plaintiff did not meet its burden to pass the pleadings stage. To survive a Rule 12(b)(6) motion to dismiss, a complaint “does not need detailed factual allegations.” A plaintiff need only “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555, 557 (2007). This is a low bar— “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (internal citations omitted).

The Second Circuit considers the Rule 12(b)(6) requirements under a totality of the circumstances analysis, which often manifests as a low bar. *See, e.g., Bristol-Myers Squibb Co. v. Matrix Laboratories Ltd.*, 655 Fed. Appx. 9 (2016) (holding that a fact-intensive inquiry could not be resolved at the motion to dismiss stage and must proceed to the discovery stage); *Rothman v. Gregor*, 220 F.3d 81 (2000) (reversing the district court’s dismissal, in part due to a

“misleading omission” by Defendants). When the Second Circuit does affirm Rule 12(b)(6) dismissals, the totality of the circumstances is so clear as to leave no reason to proceed to trial. *See, e.g., Fink v. Time Warner Cable*, 714 F.3d 739 (2013) (affirming dismissal where the plaintiff misquoted and took out of context the relevant language in his pleadings); *Document Techs., Inc. v. LDiscovery, LLC*, 731 Fed. Appx. 31, 34 (2018) (affirming dismissal where there is not “a single” relevant piece of evidence or “any support” for the plaintiff’s claims).

*Herrmann* is the seminal case in this Circuit regarding a 12(b)(6) motion to dismiss for a claim arising under ERISA’s “evade or avoid” provision. In *Herrmann*, the Second Circuit affirmed dismissal of the claim. However, the mere fact that this Court dismissed a similar claim decades ago is not dispositive in the case at bar. Although, as discussed above, the basic acquisition agreement frameworks here and in *Herrmann* are similar, such that the same reading of ERISA’s “evade or avoid” provision should apply, the totality of the circumstances in *Herrmann* is quite different. Specifically, in *Herrmann*, the Second Circuit affirmed dismissal because:

- (1) neither [Defendants] can be construed to be an employer under the MPPAA;
- (2) fraud allegations were not pleaded with particularity; (3) the Fund mistakenly invoked the court’s diversity jurisdiction for a number of the state law claims;
- (4) with the dismissal of the federal law claims, discretionary pendant jurisdiction should not be exercised; (5) even if a federal claim is recognized, the pendant state law claims should be dismissed because they are disproportionate in number; and
- (6) the request for interim quarterly payments of the withdrawal is a unique request for which there is no statutory authority.

*Herrmann*, 9 F.3d at 1053. None of these concerns are relevant to this matter; here, (1) employer status is not in dispute; (2) fraud is irrelevant; (3) diversity jurisdiction is not wrongfully invoked; (4) discretionary pendant jurisdiction is not requested; and (6) interim quarterly

payments are not at issue.<sup>1</sup> Thus, while *Herrmann* is good law, it is distinguishable. The facts of this case must be independently assessed.

Here, the district court relied on the following facts: “Penn Traffic’s executives received \$1 million in bonuses for closing the deal with Defendant”; “Defendant paid Penn Traffic more than \$27 million for the asset sale”; and shortly after, Penn Traffic filed for bankruptcy. Dkt. No. 28 at ¶¶ 44, 66. The district court ruled that because the Penn Traffic executives were not technically defendants, and Penn Traffic was not immediately insolvent (as it paid \$5 million to Plaintiff), Plaintiff’s First Amended Complaint cannot survive the pleadings stage. It did not justify why a \$5 million payment should satisfy the \$60 million owed.

The district court reasoned that, because Penn Traffic was able to contribute \$5 million of the approximately \$60 million owed, it is *implausible* under the Rule 12(b)(6) standard that the transaction was structured to “evade or avoid” liability. The court wholly failed to consider that the transaction was structured in order to “evade or avoid” *the vast majority* of liability. Nor did the district court explain why Defendant’s proffered explanation, that “[Defendant’s] takeover of Penn Traffic’s wholesale distribution division would allow Penn Traffic to focus on its retail division, restore Penn Traffic’s profitability, and position Penn Traffic for long-term success,” was persuasive. Rather, Penn Traffic’s eventual insolvency and inability to produce a significant portion of its withdrawal liability should serve as evidence that Defendant’s reasoning is inaccurate at best and misleading at worst.

In any case, these are questions that require evidence-gathering in the discovery stage. Namely, Plaintiff seeks documents or other records evincing the true intent of Penn Traffic and

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<sup>1</sup> Factor (5) has been skipped because it was outside of the scope of the class for which this brief was written.

Defendant in structuring this transaction. This Court should reverse the district court's dismissal of this claim to allow parties to proceed to discovery.

[Section C, arguing that the district court erroneously granted summary judgment to Defendant on the issue of withdrawal liability, has been omitted for brevity.]

#### **VIII. CONCLUSION**

For the foregoing reasons, this Court should reverse the district court's dismissal of Plaintiff's "evade or avoid" claim. It should also reverse the district court's grant of summary judgment to Defendant on the issue of successorship liability.

**Applicant Details**

First Name	Howard
Middle Initial	H.
Last Name	Kim
Citizenship Status	U. S. Citizen
Email Address	<a href="mailto:hhk2116@columbia.edu">hhk2116@columbia.edu</a>
Address	<div> <b>Address</b>  <b>Street</b>  <b>41-17 Crescent St. #10A</b>  <b>City</b>  <b>Long Island City</b>  <b>State/Territory</b>  <b>New York</b>  <b>Zip</b>  <b>11101</b>  <b>Country</b>  <b>United States</b> </div>
Contact Phone Number	(917) 974-0721

**Applicant Education**

BA/BS From	Boston College
Date of BA/BS	May 2016
JD/LLB From	Columbia University School of Law
	<a href="http://www.law.columbia.edu">http://www.law.columbia.edu</a>
Date of JD/LLB	May 18, 2022
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Columbia Human Rights Law Review
Moot Court Experience	No

**Bar Admission****Prior Judicial Experience**

Judicial Internships/Externships Yes

Post-graduate Judicial Law Clerk      **No**

### **Specialized Work Experience**

### **Recommenders**

Richman, Dan  
drichm@law.columbia.edu  
212-854-9370

Thomas, Kendall  
kthomas@law.columbia.edu  
212-854-2288

Kudla, Danielle  
Danielle.Kudla@usdoj.gov

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**



**HOWARD H. KIM**

41-17 Crescent St., Apt. 10A, Long Island City, NY 11101  
(917) 974-0721 • hhk2116@columbia.edu

March 4, 2022

The Honorable Lewis J. Liman  
United States District Court  
Southern District of New York  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, Room 701  
New York, NY 10007-1312

Dear Judge Liman:

I write to apply for a clerkship in your chambers for a term commencing in 2024 or any time after. Currently, I am a third-year student at Columbia Law School and the very first in my family to study law. After completing their 2021 summer associate program, I have accepted a full-time offer to join Sullivan & Cromwell in New York as a litigation associate.

As an aspiring litigator and federal prosecutor, I am particularly interested in clerking for you since you served as an Assistant United States Attorney for several years.

Enclosed please find a resume, transcripts, and a writing sample. Also enclosed are letters of recommendation from Professor Daniel Richman (212-854-9370, drichm@law.columbia.edu), Professor Kendall Thomas (212-854-2288, kthomas@law.columbia.edu), and Assistant U.S. Attorney Danielle Kudla (347-387-5408, Danielle.Kudla@usdoj.gov).

Thank you for your consideration. Please let me know if there is any additional information I can provide.

Respectfully,



Howard Kim

## HOWARD H. KIM

41-17 Crescent St., Apt. 10A, Long Island City, NY 11101  
(917) 974-0721 • hhk2116@columbia.edu

### EDUCATION

**Columbia Law School**, New York, NY

J.D. expected May 2022

Honors: James Kent Scholar (for outstanding academic achievement)

Activities: *Columbia Human Rights Law Review*, Articles Editor  
Asian Pacific American Law Students Association

**Fordham University School of Law**, New York, NY

August 2019 – May 2020

Honors: *Fordham Law Review* (invited)

**Boston College**, Chestnut Hill, MA

B.A., *cum laude*, received May 2016

Majors: Philosophy, Political Science

Honors: College of Arts and Sciences, Honors Program  
Aquino Scholar (highest Asian-American award granted annually)

Activities: Korean Students Association, Co-President  
Asian Caucus Cabinet, Voting Member

Study Abroad: University College London, United Kingdom, Fall 2014

### EXPERIENCE

**U.S. Attorney's Office for the Southern District of New York**, New York, NY

*Legal Extern*

Fall 2021

**Sullivan & Cromwell LLP**, New York, NY

*Summer Associate (offer extended)*

Summer 2021

Researched and drafted legal memoranda on securities, employment, and internal investigation matters.  
Conducted due diligence on merger and acquisition deals. Researched public health issues for NYLPI.

**The Hon. Dora Irizarry, U.S. District Court (E.D.N.Y.)**, Brooklyn, NY

*Judicial Intern*

Summer 2020

Researched and drafted opinions and bench memoranda on Section 1983 claims, immigration and administrative law disputes, and other substantive and procedural motions.

**WeWork Companies Inc.**, New York, NY

*Legal Contracts Associate*

October 2018 – July 2019

Negotiated and drafted contract terms and nondisclosure agreements for multi-year transactions with Fortune 500 companies. Assisted with litigation responses to government document requests.

**Sullivan & Cromwell LLP**, New York, NY

*Litigation Legal Assistant*

July 2016 – May 2018

Assisted in complex litigation involving federal and state cases and regulatory matters regarding alleged emissions issues. Interpreted Korean in client meetings for successful pro bono domestic violence case.

**Volunteering:** Asian American Bar Association of New York, Student Leader; Exilic Presbyterian Church's Justice Ministry, Co-Lead

**Interests:** Film essays, solo backpacking, volleyball



## Registration Services

law.columbia.edu/registration  
 435 West 116th Street, Box A-25  
 New York, NY 10027  
 T 212 854 2668  
 registrar@law.columbia.edu

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Program: Juris Doctor

Howard H. Kim

**Transfer Credits: 32.0**

Course Credits: Legislation and Regulation; Contracts; Torts; Civil Procedure; Constitutional Law; Criminal Law; Property; Moot Court

**Spring 2022**

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6256-1	Federal Income Taxation	Raskolnikov, Alex	4.0	
L6655-2	Human Rights Law Review Editorial Board		1.0	
L6473-1	Labor Law	Andrias, Kate	4.0	
L6274-2	Professional Responsibility	Rose, Kathy	2.0	
L8659-1	S. The Roberts Court [ Minor Writing Credit - In Progress ]	Metzger, Gillian; Verrilli, Donald B.	2.0	

**Total Registered Points: 13.0****Total Earned Points: 0.0****Fall 2021**

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6293-1	Antitrust and Trade Regulation	McCrary, Justin	3.0	A
L6603-1	Ex. Federal Prosecution: U.S. Attorney's Office for the SDNY	Castellano, Gina; Rodriguez, Justin	2.0	A
L6603-2	Ex. Federal Prosecution: U.S. Attorney's Office for the SDNY - Fieldwork	Castellano, Gina; Rodriguez, Justin	2.0	CR
L6425-1	Federal Courts	Kent, Andrew	4.0	A-
L6655-2	Human Rights Law Review Editorial Board		1.0	CR

**Total Registered Points: 12.0****Total Earned Points: 12.0**

**Spring 2021**

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-2	Evidence	Capra, Daniel	4.0	A-
L6429-1	Federal Criminal Law	Richman, Daniel	3.0	A
L6655-1	Human Rights Law Review		0.0	CR
L6071-1	Law and Development	Pistor, Katharina	3.0	A-
L9137-1	S. Sentencing	Richman, Daniel; Sullivan, Richard	2.0	A-
L6683-1	Supervised Research Paper	Genty, Philip M.	1.0	CR

**Total Registered Points: 13.0****Total Earned Points: 13.0****Fall 2020**

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6231-2	Corporations	Pistor, Katharina	4.0	A-
L6238-1	Criminal Adjudication	Richman, Daniel	3.0	A
L6675-1	Major Writing Credit	Genty, Philip M.	0.0	CR
L9823-1	S. Human Rights & the Question of Culture	Thomas, Kendall	3.0	A
L8412-1	S. Trial Skills: Immigration	Harbeck, Dorothy	3.0	A
L6683-1	Supervised Research Paper	Genty, Philip M.	2.0	CR

**Total Registered Points: 15.0****Total Earned Points: 15.0****Total Registered JD Program Points: 85.0****Total Earned JD Program Points: 72.0****Honors and Prizes**

Academic Year	Honor / Prize	Award Class
2020-21	James Kent Scholar	2L

**Pro Bono Work**

Type	Hours
Mandatory	40.0
Voluntary	344.0